

1996

Stichting Mayflower Recreational Fonds v. County Board of Equalization of Wasatch County, State of Utah : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Stichting Mayflower Recreational Ponds v. County Board of Equalization of Wasatch County*, No. 960280 (Utah Court of Appeals, 1996).

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BRIEF

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DOCKET NO. 960280-CA
IN THE UTAH COURT OF APPEALS

STICHTING MAYFLOWER
RECREATIONAL FONDS,

Petitioner/Appellee,

-vs-

COUNTY BOARD OF
EQUALIZATION OF WASATCH
COUNTY, STATE OF UTAH,

Respondent/Appellant.

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Case No. 960280-CA

Priority 14

BRIEF OF APPELLANT

PETITION FOR REVIEW OF TAX COMMISSION DECISION

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PEALS

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STATEMENT OF JURISDICTION

On August 25, 1995, the Utah State Tax Commission issued its Findings of Fact, Conclusions of Law, and Final Decision. [R. 84] On September 14, 1995, appellant County Board of Equalization for Wasatch County filed a petition for reconsideration with the Utah State Tax Commission. [R. 82] On November 3, 1995, appellant filed a Petition for Review of a Decision of the Utah State Tax Commission. [R. 27] On February 9, 1996, the Tax Commission issued its Order denying appellant's request for reconsideration. [R. 1A]

The Utah Supreme Court poured this appeal over to the Utah Court of Appeals. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. §§ 78-2-2(3)(e)(ii), -2-2(4) and 63-46b-16.

STATEMENT OF ISSUES and STANDARD OF REVIEW

The Tax Commission held that grazing activity on appellant's property was "agricultural use" under the Utah Constitution and the Farmland Assessment Act and satisfied the Act's production requirements. The issues on this appeal are:

1. Whether, as matter of law, the agricultural use requirement of the Utah Constitution and the Farmland Assessment Act is satisfied when a herder tries to keep his animals off the subject land yet the animals occasionally wander there.

Standard of Review — The Tax Commission's legal conclusion on agricultural use in the South Mountains is subject to a correction of error standard. Utah Code Ann. § 59-1-610. The Court gives no deference to the Commission's interpretation of agricultural use

requirement of the Utah Constitution and the Farmland Assessment Act. See Board of Equalization v. Utah State Tax Commission, 846 P.2d 1292, 1295 (Utah 1993). See also OSI Industrial, Inc. v. State Tax Commission, 860 P.2d 381, 383 (Ut. Ct. App. 1993).

2. Whether Mayflower proved by a preponderance of the evidence that the South Mountains were used for agricultural purposes.

Standard of Review — The Tax Commission's factual finding on agricultural use in the South Mountains will be affirmed only if it is supported by substantial evidence in the record as a whole. Utah Code Ann. § 59-1-610. The Court considers evidence on both sides of the issue and only affirms the agency's decision if the "quantum and quality of the relevant evidence . . . is adequate to convince a reasonable mind to support a conclusion." Utah Association of Counties v. Tax Commission, 895 P.2d 819, 821 (Utah 1995).

3. Whether the Tax Commission erroneously placed on Wasatch County the burden of proving that Mayflower had not satisfied the production requirements of the 1993 Farmland Assessment Act.

Standard of Review — The Tax Commission's legal conclusion placing the burden of proof on Wasatch County is subject to a correction of error standard. Utah Code Ann. § 59-1-610. The Court gives no deference to the Commission's decision. See Board of Equalization, supra, 846 P.2d at 1295. See also OSI Industrial, supra, 860 P.2d at 383.

4. Whether Mayflower proved by a preponderance of the evidence that the grazing activity on its property satisfied the production requirements of the 1993 Farmland Assessment Act.

Standard of Review — The Tax Commission's finding that Mayflower fulfilled its burden of proof will be affirmed only if it is supported by substantial evidence in the record as a

whole. Utah Code Ann. § 59-1-610. The Court considers evidence on both sides of the issue and only affirms the agency's decision if the "quantum and quality of the relevant evidence . . . is adequate to convince a reasonable mind to support a conclusion." Utah Association of Counties, *supra*, 895 P.2d at 821.

5. Whether the Tax Commission made sufficient subsidiary findings to support its legal and factual conclusions.

Standard of Review — Whether the Tax Commission made sufficient subsidiary findings to support its ultimate conclusions is a legal question to be determined by the Court without deference to the Tax Commission under a correction of error standard. Utah Code Ann. § 59-1-610. See Woodward v. Fazzio, 823 P.2d 474, 477-78 (Ut. App. 1991).

6. Whether Mayflower is subject to 100% penalty for its failure to report that the South Mountains were no longer used for agricultural purposes

Standard of Review — Whether Mayflower is subject to the 100% penalty is a legal question to be determined by the Court without deference to the Tax Commission under a correction of error standard. Utah Code Ann. § 59-1-610.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS.

The statutes that are relevant to the Court's consideration of this case are attached as Appendix A to this Brief.

STATEMENT OF CASE.

A. Nature of Case, Course of Proceedings, and Disposition Below.

This case involves the qualifications for greenbelt under the Utah Constitution, and the Farmland Assessment Act.¹ The Utah Constitution permits a partial property tax exemption for “[l]and used for agricultural purposes.” Utah Constitution Art. XIII § 3(2). Prior to 1993, the Act provided that land qualified for greenbelt treatment if it was “actively devoted to agricultural use” and generated in excess of \$1,000. Utah Code Ann. § 59-2-102(1)(“pre-1993 statute”)(effective until January 1, 1993). After the statute was amended, land qualified if it was used for agricultural purposes and “produced in excess of 50% of the average agricultural production per acre for the given type of land and the given county and area.” Utah Code Ann. § 59-2-102(1)(“post-1993 statute”)(effective on January 1, 1993). Although the post-1993 statute modifies the production requirement, both statutes require agricultural use to qualify for greenbelt protection.

Appellees Stitching Mayflower Recreational Fonds and Stitching Mayflower Mountain Fonds ("Mayflower") own undeveloped, separate tracts of land located around and near the new Jordanelle reservoir and U.S. 40. [R. 84-86]. In 1984, Mayflower applied for and received greenbelt treatment for this property under the Farmland Assessment Act.

¹ Under the Act, land in the greenbelt receives a significant property tax reduction. Greenbelt property is taxed at its value as agricultural property, rather than at its full fair market value. Utah Code Ann. § 59-2-505.

[R.87] Mayflower's request was based upon the grazing activity of Edward "Luke" Gillmor, whose company, Gillmor Livestock Company leased the property from Mayflower. [R. 87]

In 1992, the Wasatch County Assessor observed that Mayflower's property was not being grazed and determined that the property was not being used for agricultural purposes as required by the Farmland Assessment Act. [Tr. A. 306-07]² Wasatch County therefore (1) removed the property from greenbelt, (2) assessed a roll-back tax for years 1988-1992,³ and (3) assessed the property at its full fair market value for the 1993 tax year. [R. 87-88]

Mayflower appealed the assessment of the roll-back tax and 1993 taxes to the Wasatch County Board of Equalization. The Board of Equalization affirmed the assessment. [R. 592] Mayflower then appealed to the Utah State Tax Commission.⁴ [R. 400-484, 497-591]

The Tax Commission held a formal hearing on issue of whether the Wasatch County Assessor had properly removed Mayflower's property from the greenbelt. During the formal hearing, Wasatch County presented substantial evidence that Gillmor had not grazed his

² The record in this appeal contains two transcripts of the formal hearing. One is a transcript of the entire formal hearing except for the testimony of Denny D. Lytle and Edward L. Gillmor, Jr. It is cited as "Tr-A." The other is a transcript of testimony of Denny D. Lytle and Edward L. Gillmor, Jr. and is cited as "Tr-B."

³ Under the Farmland Assessment Act, property which is removed from greenbelt is subject to a roll-back tax which recaptures the tax savings from greenbelt treatment for the prior five years. Utah Code Ann. § 59-2-506(1) & 5.

⁴ In addition to the greenbelt issues, Mayflower appealed not only the greenbelt issue but also the issue of value for the 1993 tax year. The parties resolved the valuation by stipulation during the hearing. [R. 106] Value is thus not an issue in this appeal.

herds on any of the Mayflower property in Wasatch County from approximately 1987 through the fall of 1992. Dan A. Giles, a Bureau of Reclamation employee working on the Jordanelle reservoir, was in and around the Mayflower property two or three times a week. Giles, an avid hunter, described how he was constantly on the lookout for herds of game animals and would use a telescope to search for herds on the Mayflower property and other property in and around the Jordanelle reservoir and park. Giles testified that he never saw any sheep or any evidence of sheep on either side of the Mayflower property or on an overpass joining Mayflower's property.⁵ Giles was the only disinterested person to testify about grazing on the Mayflower property. [Tr-A. 218-21, 229-46]

For its part, Mayflower offered the testimony of Gillmor who outlined the areas that he ordinarily grazed both on and off the Mayflower property including areas in which Giles had seen no evidence of grazing. Gillmor claimed to have placed approximately 600-700 sheep and lambs at the Mayflower overpass connecting the east and west sides of the Mayflower property. He also claimed that these sheep and lambs grazed on both side of U.S. 40 and the bowl area directly east of the Mayflower overpass. This grazing occurred on property owned by Mayflower as well as others. See Statement of Facts.

Gillmor also identified the areas that he did not graze. He specifically described his efforts beginning in 1989 to keep his animals off of the South Mountain area of Mayflower's property to avoid domestic animals that would kill his sheep and lambs in large

⁵ Several witnesses testified that grazing sheep leave distinctive droppings, odors, and other evidence in the areas that they graze. [Tr-A. 89]

numbers. See Statement of Facts. Avoiding such destruction was critical because of herders' narrow profit margins. [Tr-B.154]

Following the formal hearing, the Tax Commission issued its Decision finding grazing on the **all**⁶ of Mayflower's property including the South Mountains. Findings of Fact, Conclusions of Law and Final Decision ("Decision") [R. 84]⁷ According to the Tax Commission, the agricultural use requirement was satisfied for the South Mountains because the herder "continued to have **a legal right to use that property** if it wanted to, and **some of the sheep and cattle may have wandered** onto that property from the other property." Decision p. 8 ¶ 16 (emphasis supplied). [R. 91] Although the South Mountains were the focus of much of the parties' argument, the Tax Commission does not explain its legal analysis, nor does it provide subsidiary factual findings describing the parts of the South Mountains purportedly grazed, the duration of the grazing, or the numbers of animals involved.⁸

⁶ The Tax Commission's factual finding of grazing directly contradicts the testimony of Dan Giles, an unbiased witness. The Tax Commission however provides no explanation for ignoring Giles' testimony. Although the County disagrees with the Tax Commission's finding of grazing on any Mayflower property, it has chosen to limit its appeal to the Commission's finding of grazing on the South Mountains.

⁷ A copy of the Decision is attached as Appendix B..

⁸ The Tax Commission's entire analysis of this issue is found in the Factual Finding No. 16 which states:

16. Sometime during the period 1987-89, Gillmor Livestock Corporation ceased delivering sheep to the south main property [South Mountains] which is outside the density determination area. They did so because of the problems relating to the encroachment of civilization,

(continued...)

Having found agricultural use on the South Mountains, the Tax Commission next found that the post-1993 production requirements were satisfied for the entire Mayflower property including the South Mountains. Decision at pp. 11-12 ¶¶ 24-25. [R. 94-95] Its computation of the productive capacity of the Mayflower property, however, did not include the acres in the South Mountains. The computation also overstates the amount of grazing that Gillmor described in his testimony. These errors arose because of the Tax Commission's misunderstanding of a hypothetical submitted in evidence.

Wasatch County requested reconsideration of the Tax Commission's Decision because Gillmor's testimony established the absence of any grazing or agricultural activity in the South Mountains and showed a concerted effort to keep animals out of that area to avoid losses from domestic dogs. [R. 82] Alternatively, the County argued that if the South Mountains were grazed, these additional acres would make it impossible for Mayflower to satisfy the production requirements of the post-1993 statute on **any** of Mayflower's property. [R. 82] These additional acres increased the productive capacity of Mayflower's land without any increase in usage. As a result, the actual usage did not satisfy the production requirement for both the South Mountains and the other acres grazed. [R. 76-77]

⁸(...continued)

including problems with sheep wandering onto private property, and problems with dogs owned by persons on the private property coming to the south main property and killing the sheep. Nevertheless, Gillmor Livestock Corporation continued to have a legal right to use that property if it wanted to, and some of the sheep and cattle may have wandered onto that property from the other property.

In response to the County's motion, the Tax Commission refused to correct the errors in its earlier Decision. With respect to grazing in the South Mountains, the Tax Commission found that "that there was significantly diminished use for the South Mountain area beginning in approximately 1989" and that "Mr. Gillmor did attempt to keep [the sheep] from the area because of the encroachment of civilization, including dogs which chase the animals." Order ("Reconsideration Order") at p. 3. [R. 3A]⁹ Notwithstanding Gillmor's efforts to prevent grazing in the South Mountains, the Tax Commission found agricultural use there because "there was testimony that the animals did occasionally graze that area." Id. [R. 3A] The Tax Commission, however, provided no legal analysis of how such use satisfied the constitution or statute and did not make sufficient subsidiary findings in support of its agricultural use finding.¹⁰

⁹ A copy of the Reconsideration Order is attached as Appendix C..

¹⁰ The Tax Commission's entire analysis of this issue is found in the following paragraph:

Regarding the [County's] first allegation that the South Mountain areas was not actively devoted to agricultural use under either the pre-1993 or the post-1993 Greenbelt Statute, the Commission recognizes that there was significantly diminished use for the South Mountain area beginning in approximately 1989. However, notwithstanding such diminished use, it is still clear that all of the subject property, including the South Mountain area was included in the property which was leased to Gillmor Land and Livestock Company, and upon which they grazed a substantial numbers of cattle and sheep. There were no fence lines to prohibit the cattle and sheep from grazing on all of the property, including the South Mountain area. In fact, there was testimony that the animals did occasionally graze that area, although Mr. Gillmor did attempt to keep them from the area because of the encroachment of civilization, including dogs which chase the animals. Further, there was never a dispute that the property produced at least \$1,000 in gross revenue from

(continued...)

With respect to the post-1993 production requirement, the Commission's Reconsideration Order held that Mayflower had established sufficient grazing to satisfy the statutory production requirement. Reconsideration Order at p. 4 [R. 4A]. It however did not identify any evidence or make any subsidiary findings explaining how the production requirement was satisfied if the South Mountain acres were included. Id. [R. 4A] Although not expressly stated, the Tax Commission placed the burden on the County of proving the production requirement had not been met. Id. [R. 4A] (discussing County's evidence but not explaining how Mayflower fulfilled burden of proof on this issue.)

Wasatch County appeals the Tax Commission's decision. The Tax Commission's finding of agricultural use in the South Mountains is without basis in law or fact. As a matter of law, the agricultural use requirement of the Utah Constitution and Farmland Assessment Act is not satisfied when an unspecified number of sheep wander on undetermined parts of the South Mountains for unknown durations, notwithstanding the herder's best efforts to prevent such wandering. In addition, the factual finding of agricultural use is not supported by substantial evidence when considered in the light of Gillmor's testimony. The Court should therefore reverse the Tax Commission's decision and enter judgment for Wasatch County.

¹⁰(...continued)

agricultural product. Therefore, the Commission believes that its decision was correct relating to the South Mountain property for the pre-1993 period.

Alternatively, the Tax Commission's holding on the 1993 production requirements is erroneous if the South Mountains are included in the property grazed. The Tax Commission erred in finding that the grazing satisfied the 1993 production requirements for South Mountains plus the other Mayflower property. The Court should therefore reverse the Tax Commission's decision and enter judgement for Wasatch County.

B. Statement of Facts

1. Mayflower's Property and the Jordanelle Condemnation.

Prior to 1989, Mayflower owned two separate tracts of land in Wasatch and Summit Counties. These two tracts were essentially north and south of each other, with the southern tract being by far the larger of the two tracts. The relative size and relationship of these tracts prior to 1989 is illustrated by a map received in evidence as Exhibit 2. [Tr-A. 46-51]

The southern tract of Mayflower's property changed dramatically in 1989. At that time, the United States Government condemned substantial portions of the southern tract of Mayflower's property for new U.S. 40 and the Jordanelle Reservoir/State Park. [Tr-A. 51-52, 59]

This taking had two significant effects on the extent and configuration of Mayflower's southern tract. First, the government took the eastern portion of the southern tract for Jordanelle Reservoir/State Park. [Tr-A. 51-52, 59] This property, which was relatively flat, included good grazing pasture. [Tr-B. 17, 37-39, 51] Second, the government took a strip of land for the new U.S. 40, which bisected the remainder of the southern tract.

As a result, the southern tract was divided into a relatively small parcel east of the new U.S. 40 and a much larger, mountainous tract west of the new U.S. 40. [Tr-A. 51-52. 59] The relative size and relationship of these tracts after the 1989 condemnation is illustrated by map received in evidence as Exhibit 112 and its subparts.

2. Gillmor's Sheep and Cattle Grazing Operations.

For many years, Edward "Luke" Gillmor, doing business as Gillmor Livestock Corporation,¹¹ has operated a sheep and cattle business. Gillmor's sheep and cattle graze during the winter months in Salt Lake and Tooele Counties. In late spring, Gillmor trucks the animals to their summer grazing ranges in Wasatch and Summit Counties. During the summer, Gillmor moves the animals among the various tracts of land. Some of these tracts were owned by Mayflower, others were not. The animals remain on these various summer ranges until mid to late November when they are returned to their winter ranges. [Tr-B. 6-12, 28-29, 62-66]

Gillmor leases part of his summer grazing ranges from Mayflower.¹² This lease purportedly covers all of Mayflower's property in Wasatch and Summit Counties. The parties have orally extended the lease each year to the present. The parties have never amended the written lease, but did reduce the lease payments beginning in 1989 because of Gillmor's inability to graze the South Mountains. [Tr-B. at 74]

¹¹ In this brief, Luke Gillmor and the Company are referred to collectively as "Gillmor."

¹² The following summarizes Gillmor's testimony. Wasatch County presented substantial evidence that Gillmor did not graze any of the Mayflower property. See note 6, infra.

Prior to 1989, Gillmor grazed sheep and cattle throughout the Mayflower property. Significant, grazing occurred on the eastside of the southern tract, the area now covered by the Jordanelle reservoir. [Tr-B. 17, 37-39, 51] In addition, Gillmor aggressively grazed the westside of the southern tract in the mountains south of Park City and Deer Valley. His practice was to place a sheep camp on a ridge located between Township Sections 33 and 34, on a relatively level area known as Bonanza Flats. He was then able to graze the Mayflower property all summer without moving the animals to other ranges that Gillmor owned. [Tr-B 24-26]

Grazing in the South Mountains ended in approximately 1989. [Tr-B. 74] By that time, the encroachment of civilization had made it impossible to graze there. Domestic dogs cause horrific damage as they tear through a sheep herd. [Tr-B. 154] To avoid this damage and economic loss, Gillmor tried to keep the sheep away from the South Mountains and limited his grazing activities to the bowl area around the Mayflower mine and northeast of the South Mountains. [Tr-B. 22-27, 39-42, 65-66, 73. Ex. 109] Livestock operations cannot economically survive such losses because of tight profit margins resulting from low lamb and wool prices. [Tr-B. 154]

Not surprisingly, Gillmor's lease payments to Mayflower were reduced to reflect the inability to use the South Mountains. After these adjustments, Gillmor only paid for the property he was in fact grazing. [Tr-B. 26, 72, 74]

Gillmor not only attempted to keep his animals off the South Mountains, he also tried to keep them off of the Deer Valley Ski area. Notwithstanding his best efforts, animals did occasionally wander on the South Mountains and these properties but were quickly returned to the grazing lands. [Tr-B. 20, 22, 24-26, 31, 73]

Since 1989, Gillmor has grazed the Mayflower property for distinct time periods throughout the summer. Typically, beginning in mid-May and continuing to late June, Gillmor would truck sheep to the Mayflower property. He would have place 1200-1500 sheep and their lambs on the Mayflower property and other property adjoining the Mayflower property in Wasatch and Summit Counties. These animals would graze this area until mid-July when Gillmor would herd them to other ranges some distance from the Mayflower properties. [Tr-B. 12-17, 19-20, 35-37, 50, 55]

In early October of the typical year, Gillmor would return the sheep to the ranges on and near the Mayflower property. The sheep would graze these ranges until mid to late November when Gillmor would truck them back to the winter ranges. [Tr-B. 28, 55-57]

In addition to sheep, Gillmor also grazed cattle on the Mayflower property and other property adjoining the Mayflower property in Wasatch and Summit Counties. The cattle arrived in three separate groups. First, in September, Gillmor would place approximately 50 head of cattle on these ranges. Second, in October, Gillmor would place an additional 70-80 head on these ranges. Third, in October, Gillmor would graze an additional 30-40

cattle. This cattle would graze these ranges until mid to late November when they would join the sheep for the ride to the winter ranges. [Tr-B. 28-31, 33, 36, 51-55, 57-60]

3. Grazing Capacity and Extent of Grazing.

In finding compliance with the 1993 production requirements, the Tax Commission relied upon a comparison of the capacity and usage measured in animal unit months (“AUMs”).¹³ Decision at 11-12 ¶¶ 24-25. [R. 94-95]

The land’s grazing capacity is computed by multiplying the number of acres grazed times the property’s graze classification. The graze classification is the number of animals the land will sustain for one month.

The amount of agricultural usage is based on the number of animals grazed, the type of animal, and the duration of the grazing. To satisfy the 1993 production requirement, the AUMs usage must exceed half of the land’s grazing capacity. [Tr-B. 93-106, 124-25]

Mayflower did not submit any evidence of the number of acres grazed or the land’s graze classification. Thus, the only evidence on these issues was the evidence submitted by the County. This evidence showed that if the South Mountains were included in the acres grazed, Gillmor’s grazing did not use half of the carrying capacity of the acres grazed.

¹³ An “animal unit month” is the amount of forage required to maintain a cow or equivalent animal in thrifty condition for one month. [Ex. 118]

4. Greenbelt Status of Mayflower's Property.

In 1984, Mayflower filed a greenbelt application on its Wasatch County property. Mayflower claimed greenbelt status based on Gillmor's grazing activity. As a result, Mayflower received the benefits of greenbelt treatment for tax years 1984 through 1992. [R. 87]

In October, 1992, the Wasatch County Assessor withdrew the Mayflower property from greenbelt because the property was not being grazed. The Assessor based his decision on his own observations of the complete absence of any grazing activity on any of the Mayflower property. [Tr-A. 306-07] These observations were confirmed by County Commissioners who reported not seeing any grazing. [Tr-A. 306-07] They were also confirmed by LeeRoy Farrell, a consultant for Wasatch County, who testified at the formal hearing that he had been on and in close proximity of the Mayflower property and had never seen any evidence of sheep or cattle grazing. [Tr-A. 366-69] In this regard, it is noteworthy that Mayflower presented no evidence of grazing at the Board of Equalization hearing. [Tr-A. 129]

SUMMARY OF ARGUMENTS

The Tax Commission ruling contains two errors. It erred as a matter of law and fact when it found agricultural use in the South Mountains. If the South Mountains were put to an agricultural use, then the Tax Commission erred in finding compliance with the 1993

production requirements. The Court need not address this second issue if the South Mountains are excluded from the area in agricultural use.

The Tax Commission found agricultural use in the South Mountains based on animals occasionally wandering on the property despite the herder's best efforts to keep them out of the area. The agricultural use requirement of the Utah Constitution and the Farmland Assessment Act however requires more than such unintentional use of property. The constitutional and statutory language requires purposeful, active use of the property. To read the constitution and statute so broadly would make the use requirement meaningless since every where animals tread would be in agricultural use no matter how unintended the use or how fleeting the contact. In addition, by dramatically expanding the land in agricultural use, it would make it very difficult for landowners to prove that their usage satisfied the 1993 production requirements for all land in agricultural use. Thus, the Tax Commission's finding of agricultural use is erroneous as a matter of law.

The Tax Commission's agricultural use finding is also factually without support in the record. With respect to the South Mountains, the undisputed evidence is that Gillmor stopped grazing there in 1989 to avoid the domestic dogs killing his sheep, and that he quickly tried to retrieve any animals which may have wandered there. Mayflower presented no evidence to show grazing in the South Mountains. It presented no evidence showing that the animals wandered on the entire 1,495 acres in the South Mountains, how often such wandering occurred, how many animals were involved, or how long they stayed there.

Similarly, the Tax Commission made no subsidiary findings on any of these facts. Based on Gillmor's undisputed testimony, the Tax Commission's factual finding of agricultural use in the South Mountains is not supported by substantial evidence.

If the South Mountains were put to an agricultural use, then the Tax Commission's finding of compliance with the 1993 production requirements is not supported by substantial evidence. Under the 1993 Farmland Assessment Act, Mayflower had the burden of proving that the grazing exceed 50% of the carrying capacity of the land grazed. The Tax Commission however erroneously placed this burden on the County. In addition, the Tax Commission's determination of compliance with the production requirements was based on a misunderstanding of the factual basis of a hypotehtical, did not include the capacity of all property grazed including the South Mountains, and overstates the amount of grazing as evidenced by Gillmor's testimony. Finally, the Tax Commission's ruling is not supported by subsidiary findings necessary to understand the basis for its finding of complainece. For these reasons, the Tax Commision's ruling on compliance is not supported by substantial evidence and should be reversed.

ARGUMENT

I. THE SOUTH MOUNTAINS ARE NOT LAND USED FOR AGRICULTURAL PURPOSES UNDER THE UTAH CONSTITUTION OR THE FARMLAND ASSESSMENT ACT.

Although the parties' arguments focused on the South Mountains, the Tax Commission provides few factual findings or little legal analysis to support its finding of

agricultural use there. In its original Decision, the Tax Commission only makes one factual finding directly relating to grazing in the South Mountains. It found that Gillmor “ceased delivering sheep to the south main property [South Mountains] which is outside the density determination area . . .because of the problems relating to the encroachment of civilization.”

Notwithstanding these problems, the Tax Commission, however concluded that, some of the sheep and cattle may have wandered onto that property from the other property.” Decision at p. 8 ¶ 16. [R. 91] The Tax Commission Decision however contains no subsidiary findings on when or how often the sheep and cattle wandered on the South Mountains, how many animals wandered the South Mountains, or whether the entire South Mountains were involved.

Since Gillmor had tried to keep his animals off of the South Mountains, Wasatch County sought Tax Commission reconsideration of its finding of agricultural use in the South Mountains.

The Tax Commission’s Reconsideration Order concedes that “Mr. Gillmor [had attempted] to keep them from the area because of the encroachment of civilization, including dogs which chase the animals.” Reconsideration Order at 3. [R. 3A]. It however again found agricultural use in the South Mountains because “animals did occasionally graze that area.” Id. [R. 3A]. However, the Tax Commission made no subsidiary findings concerning the number of sheep, the time periods grazed, or the areas grazed.

The Tax Commission's decision on agricultural use in the South Mountains is legally and factually unsupportable. As a matter of law, sheep occasionally wandering on unspecified parts of property for indeterminate durations does not satisfy the constitutional or statutory agricultural use requirement, especially when the herder has used his best efforts to keep the animals off the property. Additionally, the Tax Commission's finding of agricultural use in the entire South Mountain area is factually in error because it is not supported by substantial evidence in the record. Finally, the Tax Commission fails to make sufficient subsidiary findings to support its conclusion of agricultural use. Each of these errors is addressed in turn below.

A. Agricultural Use Does Not Exist On Land Where Animals Occasionally Wander Despite The Herder's Best Efforts To Avoid Grazing The Land.

The legal issue presented by the Tax Commission's "agricultural use" determination is whether occasional wandering of sheep on property is agricultural use, where the herder uses his best efforts to keep the animals off of the property. As shown below, the Utah Constitution and Farmland Assessment Act require purposeful activity to satisfy the agricultural use requirement. Thus, even if the Tax Commission's factual findings are accepted as correct, they do not support the legal conclusion that the South Mountains were put to an agricultural use.

Any analysis of the "agricultural use" requirement must begin with the Utah Constitution's requirement that all tangible property be taxed at its full fair market value. Utah Const. Art. XIII, § 2(1). Among other things, this provision reflects a strong policy

of equality of taxation. Rio Algom Corp. v. San Juan County, 681 P.2d 194 (Ut. 1984). The Legislature has no power to exempt property unless the constitution authorizes the exemption. State v. Armstrong, 53 P. 981 (Ut. 1898). Even where an exemption is authorized, it is narrowly construed to further the exemption's purpose and to preserve uniformity. See generally Parsons Asphalt Products v. Utah State Tax Commission, 617 P. 2d 397, 398 (Ut.1980)

Among the constitutionally authorized exemptions is an exemption for "[l]and used for agricultural purposes." Ut. Const. Art. XIII, § 3(2) (emphasis supplied).¹⁴ Although the constitution authorizes the Legislature to create an exemption for agricultural land, the Legislature cannot expand the definition to property not in fact used for agricultural purposes. Salt Lake County v. State Tax Commission (Bell Mountain), 819 P.2d 776, 778 (Utah 1991). The Legislature implemented the constitutionally authorized exemption for agricultural property in the Farmland Assessment Act.

Under Utah Constitution, and the Farmland Assessment Act, greenbelt status requires proof of an active "agricultural use" on the subject property. Utah Const. Ann. Art. XIII § 3(2), Utah Code Ann. § 59-2-503(1)(b) & (c). Land is not devoted to an agricultural use unless the entire parcel is involved in or contributed to the agricultural use during the

¹⁴ Article XIII § 3(2) states:

Land used for agricultural purposes may, as the Legislature prescribes, be assessed according to its value for agricultural use without regard to the value it may have for other purposes.

relevant time period. It is not sufficient to show that some small portion of the tract is used for grazing. Bell Mountain, *supra*, 819 P.2d at 780.

In Bell Mountain, the Utah Supreme Court dealt with a factual situation remarkably similar to the instant case. There, the subject property consisted of 431.41 acres, of which only 100 acres were actually grazed. The remainder could not be grazed because gullies and ravines made it inaccessible to animals. *Id.* at 799.

On the issue critical to the instant case, the Bell Mountain Court reversed the Tax Commission's finding that agricultural use on a small portion of a larger tract qualifies the entire tract for greenbelt status. This holding was based on the constitutional agricultural use requirement as well as the statutory intent:

We do not believe that it was the intent of the constitutional authorization in article 13, section 3(2) and of the implementing statutes that a tract not in agricultural use could be bootstrapped onto a core of agricultural property and thereby spread the preferential tax assessment to a wide area.

Id. at 780.

Rather, "nonproductive areas" are included only if they are "reasonably required for the purpose of maintaining the land actually devoted to production." *Id.* at 799. Since the ungrazed portions of Bell Mountain's property were not reasonably required for the agricultural use, the Court reversed the Tax Commission's grant of greenbelt status to these properties.

The Bell Mountain case provides helpful principles for analyzing the legal issue here. First, the Utah Constitution, as well as the Farmland Assessment Act, require actual

agricultural use on all parcels to qualify for the exemption. A large tract does not qualify simply because a portion is devoted to agricultural use. Second, non-productive parcels do not qualify unless they are reasonably required for the agricultural use. The Tax Commission's legal conclusion on the South Mountains cannot be reconciled with these principles.

The Tax Commission's first basis for finding agricultural use in the South Mountains is that Gillmor had a "legal right to use that property if [he] wanted to," Decision at p. 8 ¶ 16. [R. 91]. See also Reconsideration Order at p. 4. [R. 3A] A legal right to use property is irrelevant and does not evidence agricultural use. Otherwise, an owner's right to use the property as agricultural property would always establish agricultural use.

Gillmor's supposed legal right to graze the property is particularly unimportant here, where Gillmor, with Mayflower's agreement, had stopped paying for the use of the property because it could no longer be grazed. [Tr-B. 26, 72, 74] For these reasons, the Tax Commission Decision is in error to the extent its findings is based on a legal right to use the South Mountains.

The Tax Commission's second basis for finding grazing in the South Mountains is that "some of the sheep and cattle may have wandered onto that property from the other property." Decision at p. 8 ¶ 16 (emphasis supplied) [R. 91] or that some "animals did occasionally graze that area." Reconsideration Order at p. 3. [R. 3A] The "agricultural use" requirement is not satisfied when an unspecified number of sheep wander onto some

undefined portion of the property for unknown periods of time. This is particularly true where, as here, the herder, tries to keep the animals off of the property. If such wanderings are agricultural use, any place where sheep have been know to roam, no matter how infrequently, would be entitled to greenbelt status.

Any reasoned interpretation of “actively devoted to agricultural use” requires more than just the possibility that some sheep occasionally wandered onto that property. Since this is the only finding concerning use of the South Mountains, the Tax Commission’s conclusion that Mayflower property is “actively devoted to agricultural use” is an erroneous legal conclusion.

The Tax Commission’s broad interpretation of “actively devoted to agricultural use” is contrary to the statute’s plain meaning. When interpreting constitutional or statutory language, the Utah Supreme Court often relies on the plain meaning or dictionary definition of the words used. See Salt Lake City v. Ohms, 881 P.2d 844, 850 n. 14 (Ut. 1994). In this case, the Constitution speaks in terms of “land used for agricultural purposes.” Utah Const. Art. XIII § 3(2). In addition, the Farmland Assessment Act defines “land in agricultural use” as “land devoted to the raising of useful plants and animals.”¹⁵ The pre-1993 statute requires that the land be “actively devoted to an agricultural use.” Utah Code Ann. § 59-2-503(1)(c).

¹⁵ The post-1993 is somewhat narrower. It defines “land in agricultural use” as “land devoted to the raising of useful plants and animals **with a reasonable anticipation of profit.**” Utah Code Ann. § 59-2-502(1).

Under these statutes, the critical terms are: “actively,” “devoted,” “use,” “agricultural,” and “purpose.” The Webster’s New Collegiate Dictionary (1977) defines: (1) “active” as “characterized by action rather than by contemplation or speculation . . . expressing action as distinct from mere existence or state . . . marked by vigorous activity;” (2) “devote” as “to give over (as to cause, use, or end) wholly or purposefully, <land *devoted* to agriculture>,” (3) “use” as “the act of practice of employing something,” (4) “purpose” as “something set up as an object or end to be attained: INTENTION” and (5) “agriculture” as “the science or art of cultivating the soil, producing crops, and raising livestock.” Clearly, these terms require more than animals occasionally wandering on property contrary to the herder’s plan.

Broadly defining “agricultural use” as including any land where animals wander is a two edged sword. On the one hand, it would dramatically increase the land potentially subject to greenbelt protection. Any land, where animals walked, would potentially qualify for greenbelt provided that the overall operations satisfied the production requirements, even if the herder had tried to keep the animals off the property. On the other hand, the Tax Commission’s broad definition of agricultural use would make it more difficult for landowners to satisfy the 1993 statute’s production requirements. For example, a landowner whose property is grazed by a fixed number of sheep may be unable to show the grazing that consumes 50% of the land’s capacity, if the minimum production includes all land where the animals may have occasionally walked.

For the foregoing reasons, the Court should reverse the Tax Commission's legal conclusion that agricultural use existed on the South Mountains even though Gillmor tried to keep the animals off of this property.

B. Mayflower Did Not Prove Agricultural Use In The South Mountains By A Preponderance Of The Evidence.

The Tax Commission erred in finding that Mayflower had established, by a preponderance of the evidence, that the South Mountains were actively devoted to an agricultural use. Mayflower was required to show its entitlement to the exemption on all of the Mayflower property. See Parsons Asphalt Products, supra, 617 P. 2d at 398. The evidence in the record simply does not provide a basis on which "a reasonable mind" could conclude that Mayflower proved agricultural activity on the South Mountains. Utah Association of Counties, supra, 895 P.2d at 821. Rather, the evidence affirmatively establishes the absence of agricultural activity in that area. This fact ruling therefore must be reversed.

The evidence on the use of the South Mountains is clearly. Gillmor testified that, on the west side of U.S, 40, his animals grazed in the bowl areas around the Mayflower mine, but not in the South Mountains. He explained that he had to discontinue grazing to avoid losses to domestic dogs which killed his sheep. To avoid this damage and economic loss, he tried to keep his sheep out of harms way and away from the South Mountains. Any reasonable livestock owner had to do this to avoid the losses which would cut into the livestock owner's meager margins. [Tr-B. 22-27, 39-42, 65-66, 73, 74, 154. Ex. 109]

To the extent that the Tax Commission's finding of agricultural use in the South Mountains is supported by any evidence, it is supported by the testimony of Luke Gillmor. The only testimony arguably supporting the finding of agricultural use in the South Mountains is as follows:

Mayflower's Direct Examination of Gillmor [Tr-B. at p. 26, l. 15 to p.27, l. 3]

Q. Okay. Now when sheep get into this area [South Mountains], what becomes of them?

A. Well, we go get them and take them back down onto this other property.

Q. How often does that occur?

A. Not real often, as it depends on how good our herder is, or how good I--or how good we--we herd them, ourselves.

Q. Over the last few years, Mr. Gillmor, is there a way of estimating how many sheep there would have been grazing in that upper blue area [South Mountains] from time to time?

A. Well, it's hard to put an exact figure on it, because it's just periodically different bunches that go up there and then they're--as soon as we find out they're gone, we go get them and--and take them back down, so...

Mayflower's Direct Examination of Gillmor [Tr-B. p. 31, l. 5 to p. 31, l. 13]

Q. Looking at the blue area [South Mountains] on this map that we've described before, the more mountainous terrain extending up toward Bonanza Flat; do the cows use that property for grazing?

A. Very little. But cattle do sometimes climb up these canyons.

Q. What do you do when that happens?

A. Well, we usually get a phone call, like from Deer Valley and have to go--to go get them and drive them back.

Wasatch County's Cross Examination of Luke Gillmor [Tr-B. p. 73, l. 24 to p. 74, l. 2]

Q. Okay. Thank you. I think your testimony was that on the west side across--on the west side across the Mayflower interchange, if you will, that the animals primarily stayed within that little bowl--or not--I shouldn't say little, but in--within that bowl that's right on the west side of the road; is that correct? Right around the mine area?

A. Up--by the confines where I've outlined it on the map, yes.¹⁶

Q. Okay. You'll get some that will graze up, or higher, but you have to bring those back down into that area; is that correct?

A. Yes.

Although these passages discuss animal contact with the South Mountains, it is not grazing or agricultural use. No where in Gillmor's testimony is there any indication of the number of sheep grazed, the portions of the South Mountains involved, the time periods involved, or how often the grazing occurred. In fact, Gillmor identified portions of the South Mountains which could not be grazed even before he stopped grazing the South Mountains.

These selected quotes from Gillmor's testimony however do not provide a reasonable basis for finding agricultural use when they are considered in context. The following passage illustrates Gillmor's testimony concerning animals in the South Mountains. Additional passages are found in Appendix D.

¹⁶ Gillmor was referring to a line he had identified on Exhibit 109 showing that his grazing was restricted to the bowl area on the west side of the Mayflower property. [Tr-B. 73 l. 6 to 73 l. 23]

Mayflower's Direct Examination of Gillmor [Tr-B. p. 22 l. 21 to p. 27 l. 25]

Q. Looking at the property which is toward the bottom part of the drawing which is Exhibit D-1[2], you will see some that's shaded in blue [South Mountains]; do you see that?

A. Yes.

Q. And it's described here as Mayflower properties other. Are you familiar with that property?

A. Yes.

Q. Can you describe what the topography is there for us?

A. Part of it is very steep and there's almost no water on it whatsoever.

Q. At the top of that property is an area which on the map shows as Bonanza Flat; are you familiar with that--

A. Yes.

Q. --area? What is that area like?

A. This, when you get up and on the west part of this blue shaded area [South Mountains], and over on what the--it says Lone Hill on this Bonanza Flat is more of a gentle slope, rolling meadows. And when you get off this blue shaded area [South Mountains], the--the Midway Reservoir is right, real close to the line. And then over in here, there is some creeks and streams on this Bonanza Flat.

Q. In an ordinary year, do you move the sheep up that mountainside towards Bonanza Flat?

A. We haven't been, for a number of years.

Q. And why has that been the case?

A. We had a lot of problems when we had the sheep up there with--first of all, there's--there's only one small spring on this blue area [South Mountains],

that's not sufficient to water a large herd of sheep and the sheep have to go off, like at this Midway Reservoir or somewhere. And we had--it was hard to keep the sheep on there, and--but more so, we had a lot of problems with wild--or domestic dogs that were coming up from Park City and attacking the sheep.

Q. Okay.

A. And then also, we, as time went on, from this State park, there's a lot of people up there and a lot of people use this property for recreation and it's--it's hard to graze the sheep in there when there's so many people just doing all sorts of different type of recreational activities.

Q. When did that, (inaudible) you've just described, the dogs, for example, or the people engaged in recreational activities, when did that become a serious interference with putting sheep up in those areas?

A. Well, it was, right at the time when we had the sheep up there in the--in the latter part of the '80's, and it's just--it--the last couple years that we actually had the sheep camp up there and it became so we figured it was more problem than it was worth to try and graze on it. With the--you know, with the whole herd.

We still have stock that periodically have come up onto the--came up these canyons, especially sheep, because sheep's natural tendency is to climb up and through all the years, we've periodically had to come up onto this blue area [South Mountains] and bring back sheep that have strayed off and gone up.

Q. Gone up on their own?

A. Yes.

[Testimony deleted.]

Q. Okay. When you have--well, let's back up a moment. After discontinuing the sheep camp there, have you re-instituted it during any particular year?

A. No. There's--since that time, we--I haven't had a-- or I'm--before that time, I was paying the Mayflower for the use of this property and after--since that time, I--I haven't been.

Q. Okay. What do you regard yourself as paying them for today? This is--is this property within your lease today, as you understand it?

A. Yeah, I--yes, it is, as far--with the understanding that it's very difficult to use and the payment that I was making on those years when we had this sheep camp on it all summer long, it's been our--the understanding between me and the Mayflower that we wouldn't make that extra payment.

Q. For maintaining the sheep camp there?

A. Right. In other words, those years that when we have the sheep camp up here, we didn't--those sheep that were up here didn't move off and go up to our private summer range, they stayed here all summer.

Q. Okay. Now when sheep get into this area, what becomes of them?

A. Well, we go get them and take them back down onto this other property.

Q. How often does that occur?

A. Not real often, as it depends on how good our herder is, or how good I--or how good we--we herd them, ourselves.

Q. Over the last few years, Mr. Gillmor, is there a way of estimating how many sheep there would have been grazing in that upper blue area [South Mountains] from time to time?

A. Well, it's hard to put an exact figure on it, because it's just periodically different bunches that go up there and then they're--as soon as we find out they're gone, we go get them and--and take them back down, so...

Q. Some of the pieces that are shown here in blue are not physically contiguous; did that ever prevent you using those areas?

A. Not the contiguous part. There--this--these pieces down here are in a real steep, treacherous canyon area and it's hard to get the sheep on to them, and I think it's--they're pretty limited grazing value.

Q. Are those still within the lease that you're operating under today?

A. Well, it's my understanding all the property is described in the lease.

In addition to Gillmor's testimony was the testimony of Denny D. Lytle, Manager of the Standards and Research Section of the Property Tax Division, who had substantial formal education in agricultural economics and had published various article on the business of agriculture. [Tr-B. 83-84] Lytle testified that loss of sheep to predators, including domestic animals, could devastate herders because of their meager profit margins. [Tr-B p. 154 l. 7 to p. 154 l. 23]

The relevant evidence in this case is not "adequate to convince a reasonable mind" that Mayflower fulfilled its burden of proving that the South Mountains was devoted to an agricultural purpose. See Utah Association of Counties, supra, 895 P.2d at 821. Mayflower has not only failed to prove grazing in the South Mountains, but the evidence does not identify the areas in which the animals wandered, nor does it provide any indication of how often these sojourns occurred or how long they lasted. The evidence in this case simply would not convince a reasonable person that Mayflower fulfilled its burden of proving agricultural activity in the South Mountains.

What the record does affirmatively show is that no agricultural activity occurred in the South Mountains. Gillmor stated that he stopped taking his sheep to the South

Mountains because they would be destroyed. Given the economics of the livestock business, Gillmor could not afford these expenses and was thus highly motivated to limit the time the animals may have wandered on to the South Mountains. Given the absence of any controverting evidence, the only conclusion that could be reached in this case is that there was no agricultural use in the South Mountains.

C. The Tax Commission's Factual Findings Are Insufficient On Agricultural Use In The South Mountains.

The Tax Commission's failure to make subsidiary findings provides another grounds for reversing agricultural use finding. The Tax Commission's finding of grazing on the South Mountains is not supported by any subsidiary findings. Nowhere does the Tax Commission state where the grazing occurred, how often it occurred, what the duration was, or how many or what types of animals were involved. Without these subsidiary findings, it is impossible to assess the "logical and legal basis for the [Tax Commission's] ultimate conclusions." U.S. West Communications, Inc. v. PSC, 882 P.2d 141, 146 (Utah 1994).

II. ASSUMING ARGUENDO THAT THE SOUTH MOUNTAINS WERE USED FOR AN AGRICULTURAL PURPOSE, MAYFLOWER CANNOT SATISFY THE PRODUCTION REQUIREMENTS OF THE 1993 FARMLAND ASSESSMENT ACT.

If the South Mountains were used for an agricultural purpose, which they were not, the issue then becomes whether substantial evidence supports the Tax Commission conclusion that Mayflower established by a preponderance of the evidence that Gillmor's grazing used 50% of the carrying capacity of all acres grazed including the South

Mountains. For the purposes of this analysis, the acres grazed includes, as the Tax Commission held, all acres on which animals may have wandered. This would necessarily include substantial acres in addition to those owned by Mayflower.

With respect to the production requirement, Mayflower bears a twofold burden. First, it must show the carrying capacity of the acres grazed. Second, it must show that half of this capacity was in fact used. Utah Code Ann. § 59-2-102(2)(Land must “produce in excess of 50% of the average agricultural production per acre for the given type of land and the given county and area.”) If Mayflower fails to establish either of these elements by a preponderance of the evidence, its claim to the exemption for 1993, must fail. See Parsons Asphalt Products, supra, 617 P. 2d at 398.

The Tax Commission erred in finding that Mayflower met its burden on each of these elements. The County presented the only evidence on the number of acres grazed or on the graze classification of the acres. Thus, when the Commission rejected this evidence and found for Mayflower, it erroneously placed the burden of proof on the County. Moreover, the Tax Commission’s finding of compliance is not supported by Gillmor’s testimony on the number of animals grazed, the duration of the grazing, and the number of acres grazed. Finally the County’s evidence, which is uncontroverted, shows that Mayflower did not comply with the production requirements. Each of these arguments are addressed in turn below.

A. The Tax Commission Erroneously Placed On Wasatch County The Burden Of Proving Non-Compliance With The Production Requirements.

The burden of proof in cases such as this is clear. The taxpayer has the burden of proving by a preponderance of the evidence not only an error in the assessment, but also the correct assessment. Hercules Inc. v. Utah State Tax Commission, 877 P.2d 169, 172 (Ut. App.1994). In addition, the taxpayer has the burden of proving by a preponderance of the evidence the facts supporting a claim to a property tax exemption. See Parsons Asphalt Products, *supra*, 617 P. 2d at 398. Under these principles, if the evidence is unclear or insufficient to establish a necessary element of a claim to an exemption, the Tax Commission must deny the exemption.

While the Tax Commission Decision and Reconsideration Order refer to these principles, the Tax Commission's decision squarely places on Wasatch County the burden of proving that Mayflower did not comply with the statutory production requirements. This is best shown by considering the Reconsideration Order's discussion of the production requirement in light of the Tax Commission's holding in its original Decision.

The Tax Commission's original Decision, held that in determining production capacity, the capacity of **all** acres grazed must be considered, not just the capacity of the Mayflower acres. Decision at p. 11 ¶ 24. [R. 94] This only makes sense. Otherwise, a herder

could graze the same animals on multiple parcels and satisfy the production requirement for the parcels individually but not for parcels considered as a whole. [Tr-B. 110, 146]¹⁷

Thus, to determine the total carrying capacity of the acres grazed requires the total number of acres grazed, not just the number of Mayflower acres. In this case, it is undisputed that Gillmor's animals, in connection with grazing operations on Mayflower property, grazed on acres in addition to the Mayflower acres. [Tr-B. 66] These additional acres consisted of 1600 acres of Gillmor's own property located in Summit and Wasatch Counties. [Tr-B. 66-69] It also consisted of other acres along U.S. 40 connecting the Mayflower tracts as well as immediately surrounding the southern tract. [Tr-B. 64-66. Ex. 109] Finally, under the Tax Commission's definition of agricultural use, it would include any acres where sheep may have wandered.

To prove compliance with the production requirement, Mayflower had the burden of proving the number of additional acres grazed and the graze classification of these additional acres. Mayflower however submitted no evidence on these elements of the production computation.

The Tax Commission's Reconsideration Order expressly recognizes the absence of proof on these issues. After noting the existence of grazing on non-Mayflower property, it

¹⁷ An example will illustrate. A herder grazes one cow for one month on two separately owned one acre parcels. Each parcel has one AUM of capacity meaning each has the carrying capacity to sustain one cow for month. The total capacity of both parcels is two AUMs. If the carrying capacity of each parcel is considered separately, then each owner could claim that the one cow grazes their property for one month and thus uses one AUM. If the capacity is based on the entire area grazed, then the grazing is less than the carrying capacity of the property.

states: “However, there is no showing as to what the agricultural classification of that additional lands, and the amount of acreage used by [the County in its computation] was merely based on a rough drawing on a large map.” Reconsideration Order at p. 4. [R. 3A] Because of this absence of proof, the Tax Commission determined the production requirement based solely on the Mayflower acres and ignoring all the non-Mayflower acres grazed.

By so ruling, the Tax Commission erroneously placed the burden of proof on the County. If the evidence was not sufficient to properly compute the production requirement on the acres grazed, Mayflower failed to prove its entitlement to the exemption. The Tax Commission’s finding on this issue must be reversed and judgment entered for Wasatch County.

B. Marshaling of Evidence On Issue Of Compliance With 1993 Production Requirements.

The deficiencies in the Tax Commission’s holding arise from its misunderstanding of the hypothetical in Exhibit 119 and its subsequent efforts to preserve its holding when this misunderstanding became evident. In its original Decision, the Tax Commission made findings based on Exhibit 119, as if it contained facts, rather than hypothetical data. Decision at p. 11-12 ¶¶ 24-26 [R. 94-95] Unbeknownst to the Tax Commission, this hypothetical however understated the property’s productive capacity by excluding the South Mountains. It also overstated the grazing described in Gillmor’s testimony.

When the County's motion for reconsideration brought this misunderstanding to light, the Tax Commission did not abandon its original holding or analysis on the production requirement, nor did it explain how its original holding properly accounted for the capacity of the South Mountains. Instead, the Tax Commission Reconsideration Order gets over these real issues by simply concluding, that Mayflower had "clearly established" compliance with the production requirement. Reconsideration Order at 4 [R. 4A] It then refuses to include all acres grazed in the computation of capacity because the County had failed to prove the number of acres grazed or the graze classification. Id. In so doing, the Tax Commission erroneously placed the burden of proof on the County which presented the only evidence on either of these issues.

Because the Tax Commission's analysis on the production requirement is not entirely consistent or fully explained, it is difficult to neatly marshal the evidence on the production requirement. See Woodward, supra, 823 P.2d at 477-78 (absence of subsidiary findings makes marshaling futile). The Tax Commission essentially makes three factual findings in its Decision and Reconsideration Order on compliance with the 1993 production requirements. Although these findings are related, it is more understandable to address them separately in the order in which they appear in the Decision and Reconsideration Order.

- 1. The Tax Commission's Decision Fails To Include The Grazing Capacity Of The South Mountains In Determining Compliance With The 1993 Production Requirements.**

The Tax Commission's first computation of capacity and usage is found in its original Decision. There, after finding that the South Mountains were grazed, the Commission computed capacity and usage for the property grazed based on a hypothetical provided by the County's witness and found in Exhibit 119. Decision at p. 11-12, ¶¶ 24-26. [Tr-B. 98-106. Ex 119] The Tax Commission apparently believed that this exhibit included the capacity for acres in the South Mountains as well as acreage owned by Gillmor. In any event, based on this exhibit, the Commission concluded that the production requirement was satisfied for all property grazed including the South Mountains.

The Tax Commission determined the carrying capacity of the acres grazed by computing the acre's AUM capacity.¹⁸ Decision at p. 11-12 ¶¶ 24-26 [R. 94-95] This computation used the 4,714 acres found in the hypothetical in Exhibit 119. The Tax Commission indicates that this acreage includes all of the Mayflower property including the South Mountains plus Gillmor's property. No evidence supports this conclusion.

Contrary to the Tax Commission's holding, the 4,714 acres taken by the Commission from the hypothetical does not include the South Mountain acres. The 4,714 acres in the hypothetical is the acres Gillmor grazed, not including the South Mountains. [Tr-B. 102, 106, 124-25] This acreage was not arbitrarily selected. In earlier testimony, the County's

¹⁸ An AUM or animal unit month is the amount of forage required to maintain a cow or equivalent animal in thrifty condition for one month. Agricultural land is classified based on how many AUMs it can maintain. For example, Graze I property can maintain one AUM per acre. The formula for computing the AUM capacity of land is the total acres grazed times the property's graze classification. [Tr-B. 98-106]

expert witness had computed the number of acres grazed using an outline made by Gillmor on Ex 109. This outline did not include the South Mountains. [Tr-A. 182-87. Ex. 112c] Mayflower presented no evidence on the number of acres grazed.

The Tax Commission also failed to properly account for the land owned by Gillmor. In computing capacity, the Commission stated its intent to include the capacity of the non-Mayflower acres owned by Gillmor. Decision at p. 11¶ 24. [R. 94] It however states that the acres grazed was 4,714, of which 3,420 belonged to Mayflower. Thus, the Gillmor property acres must be 1,294, the difference between the total acres of 4,714 and Mayflower's acres of 3,420. Gillmor however testified that he used 1,600 acres of Gillmor property. [Tr-B. 69]

After the acreage is determined, the next step in the computation of AUM capacity is the property's graze classification. In its Decision, the Tax Commission uses a Graze II classification, the classification found in the hypothetical. This graze classification means that one acre of the property could sustain .63 cows for one month. This graze classification was used in the hypothetical because substantially all of the acres grazed by Gillmor were Graze II.

In assessing the Tax Commission's computation of capacity, it is important to recognize that Mayflower submitted no evidence relevant to the computation of AUM capacity. It did not present evidence of the total acreage grazed or of the property's graze

classification. The only evidence submitted on either of these issues was presented by the County.

The only evidence concerning the total number or acres grazed is that Gillmor grazed 4,714 acres, not including the South Mountains.¹⁹ If the 1,495²⁰ additional acres in the South Mountains are included in the Tax Commission's computation, the total acreage grazed is 6,209 and the AUMs required is 1956.²¹ Since Gillmor, at most, used 1725 AUMs based on the Tax Commission's factual findings, the usage did not exceed the required AUMs.

In light of the foregoing, it is clear that the Tax Commission's computation of AUM capacity is not supported by substantial evidence. No evidence supports the Tax Commission's assumption that this computation includes the capacity of the South Mountains or of the Gillmor acres. In addition, Mayflower presented no evidence relevant to the AUM computation. Thus, the Tax Commission's finding that Mayflower proved compliance with the 1993 production requirements must be reversed.

¹⁹ This acreage amount is somewhat understated because it does not include all areas where animals may have wandered.

²⁰ For the purposes of settling valuation only, the County agreed that the area outside the density determination area was 1,495 acres. [R. 106] The County, however, presented uncontroverted evidence that the South Mountains outside the peanut shaped grazing area contained 1,748 acres. [Tr-A. 188]

²¹ With number of acres and graze classification identified, the total carrying capacity for all acres is determined by simple multiplying the acres time the capacity per acre. Multiplying acres of 6,209 times .63 AUMs/acre produces 3912 AUMs of capacity. However, the 1993 production requirement only requires use of half of the capacity or 1956.

As can be seen from this computation, an overly broad definition of “agricultural use” makes the AUM requirement more difficult to satisfy. If “agricultural use” occurs wherever sheep may have wandered, these additional acres increase the AUM requirement without any offsetting increase in use. For example, in the instant case, not only must the South Mountains’ acres be included but also the Deer Valley Ski Area and a variety of other places where sheep may have wandered.

2. The Tax Commission’s Decision Overstates The Amount Of Grazing In Determining Compliance With The 1993 Production Requirements.

After computing the AUM capacity of the land grazed, the Tax Commission next computes the number of AUMs used by Gillmor in his grazing. For the purposes of computing AUMs used, cows and sheep are treated somewhat differently. One cow grazing for one month is one AUM, whereas five sheep grazing for one month is one AUM. This difference in treatment only reflects the obvious fact that cows require more food to sustain them than sheep do. These ratios also assume that the sheep or cow will have one offspring in tow. [Tr-A. 98-106]

The computation of AUMs used turns on the number of animals, the type of animal, and the duration of the grazing. For example, five cows and their calves grazing for four months equals twenty AUMs. On the other hand, five sheep and their lambs grazing for four months equals only four AUMs. [Tr-A. 98-106]

As with its computation of capacity, the Tax Commission Decision simply relies on Exhibit 119 as the basis of its computation of the AUMs used by Gillmor. This hypothetical

however was based on overstated usage. For example, it was assumed that 1500 sheep grazed the property for 4 months and that 175 cattle grazed the property for 3 months, even though Gillmor's testimony was that less grazing occurred. [Tr-A. 98-106] Since these assumptions are not supported by substantial evidence, the Tax Commission's finding that Gillmor used 1725 AUMs is not supported by substantial evidence.

Relying on the hypothetical in Exhibit 119, the Tax Commission found that 175 cows grazed for 3 months. Decision at p.12 ¶ 25. Exhibit 119 was simply a hypothetical. No evidence suggests that Gillmor grazed this number of cows on the property for this length of time.

Gillmor testified with specificity concerning the numbers of cattle and time periods that they grazed. Specifically, he described three separate groups of cows which arrived from different ranges: (1) 50 cows grazed from September to mid to late November; (2) 70-80 cows grazed from October to mid to late November; (3) 30-40 cows grazed from October to mid to late November. [Tr-B. at 57-60. Ex. 107]

In light of this uncontroverted testimony, the Tax Commission's finding concerning the number of cows and duration of grazing is not supported by substantial evidence. As a result, its computation of the amount of the AUMs used by Gillmor should be 1590, rather

than 1725 computed by the Tax Commission.²² Properly computing the AUMs used further increases the gap between the usage and the production requirement.

3. The Reconsideration Order's Finding Of Compliance With The 1993 Production Requirements Is Not Supported By Substantial Evidence.

The Reconsideration Order did not correct the defects in the Decision's finding of compliance with the production requirements. The Tax Commission's computation of the grazed land's AUM capacity does not include the entire capacity of the land grazed. In addition, the computation of AUM used significantly over-states usage. Properly treating each of these factors as reflected in the undisputed evidence shows that Mayflower did not prove compliance by substantial evidence in the record as a whole.

Like its original Decision, the Tax Commission's Reconsideration Order relies on AUM computations to determine whether Mayflower has sustained its burden of proving compliance with the 1993 production requirements. The Tax Commission however does not identify the number of acres used in its computation. The Commission merely states:

[B]ased upon the calculation for just the land that is at issue in the proceeding, and the number of animals grazed on that land, the Petitioner clearly meets the AUM requirement for the post-1993 Greenbelt Statute.

²² In the Tax Commission's decision, the AUMs for cattle is 525 (175 x 3). Using Gillmor's testimony, the AUMs use for cows is as follows:

1. 50 x 3 = 150
 2. 80 x 2 = 160
 3. 40 x 2 = 80
- 390

Reconsideration Order at p. 5. [R. 5A] Although not expressly stated, the Tax Commission apparently has limited its capacity computation to the acres owned by Mayflower, “the land . . . at issue in the proceeding,” and has disregarded the other non-Mayflower acres that Gillmor admittedly grazed. In so doing, it drastically understates the grazing capacity of the land.

The Tax Commission’s justification for ignoring these non-Mayflower acres is supposed weaknesses in the County’s evidence. Reconsideration Order at p. 4-5. [R. 3A-4A] However, as shown above in IIA, this justification is erroneously places the burden of proof on the County.

The Tax Commission also justifies ignoring the non-Mayflower acres because, under the County’s approach, Mayflower “is very close to being able to satisfy the statutory requirement for all of the land.” Reconsideration Order at p. 4-5. [R. 3A-4A] It however nowhere explains how computing the production requirements using all acres grazed would make Mayflower “very close” to meeting the requirements.

Including the capacity of the South Mountains establishes non-compliance with the 1993 production requirements. Properly computed, half of the AUM capacity of the South Mountains plus the other acres grazed is 1956 AUMs. See IIB1. above. This is substantially more than 1725 of AUMs computed by the Tax Commission using inflated usage data.

Implicit in the Commission’s Reconsideration Order is that it has discretion to find compliance with the statutory requirement when the taxpayer show that he is almost, but not

quite, in compliance. The Commission has cited no authority for such a remarkable proposition.

More importantly, no evidence supports the Tax Commission's analysis in its Reconsideration Order ignoring non-Mayflower acres in computing capacity. The uncontroverted evidence was that capacity was computed using all acres grazed, not just the acres in the tax parcels. [Tr-B. 110, 146] In fact, the Tax Commission's original Decision includes non-Mayflower acres in computing capacity. Decision at p. 11 ¶ 24 (including Gillmor owned acres in computation of AUM capacity). [R. 94] For these reasons, the Court should find that the computation in the Reconsideration Order is not supported by substantial evidence.

The gap between capacity and usage becomes even greater when the capacity computation included the capacity of the additional acres in the Deer Valley Ski area and other areas where animals "occasionally grazed." Mayflower presented no evidence on number of acres in these additional grazing areas or of the graze classification of these acres. However, the gap between capacity and usage would increase whatever acres and classification is used to determine the capacity of these additional acres.

While the Reconsideration Order is ambiguous on how the Tax Commission computed AUM capacity, it is silent on how the Commission determined the AUMs used. Apparently, the Tax Commission simply re-adopted the computation in its original decision. As shown in Part IIB.2. above, the AUMs for the cattle grazed by Gillmor should be 390

AUMs, not the Tax Commission's 525 AUMs and the total AUMs should be 1590,²³ not the Tax Commission's 1725 AUMs. Comparing this 1590 AUM usage with the properly computed capacity of 1956 establishes that Mayflower failed to sustain its burden of proving compliance with the 1993 production requirements.

C. The Tax Commission's Finding Of Compliance With The 1993 Production Requirements Are Not Supported By Adequate Subsidiary Findings.

Part of the difficulty in marshaling the evidence on the 1993 production requirements has been the absence of subsidiary findings. See Woodward, supra, 823 P.2d at 477-78 (absence of subsidiary findings makes marshaling futile). In its Decision, the Tax Commission does not explain how it accounted for the capacity of the South Mountains or the Gillmor properties, although it purports to have done so. Decision at p. 11 ¶ 24. Similarly, the Reconsideration Order does not provide subsidiary findings for the conclusion that Mayflower fulfilled its burden of proof on the production requirement, nor does it explain its computation of AUM capacity or usage.

Without these subsidiary findings, it is impossible to assess the "logical and legal basis for the Tax Commission's ultimate conclusions." U.S. West, supra, 882 P.2d at 146. The need to understand the Tax Commission's logic is particular critical in the instant case where the Tax Commission's original Decision was based on a fundamental misunderstanding of the evidence cited in the Decision. See Part IIB.1. above (discussing

²³ Note that this AUM usage is based upon the maximum number of sheep grazing the maximum arguable duration.

Commission's reliance on hypotheticals in Exhibit 119). Moreover, the County cannot effectively marshal the evidence to respond to the unstated subsidiary findings purportedly supporting the Tax Commission's ultimate conclusions. For these reasons, the Court should reverse the Tax Commission's finding that Mayflower proved by a preponderance of the evidence compliance with the 1993 production requirements.

III. Mayflower Is Liable For the 100% Penalty For Its Failure To Report The Lack Of Agricultural Use In The South Mountain.

The operation of the greenbelt statute depends on the good faith compliance efforts of taxpayers. Counties simply do not have the resources to monitor all of the various parcels on greenbelt to insure compliance. As a result, to encourage voluntary compliance, the statute imposes an automatic 100% penalty on taxpayers who fail to notify the County of the termination of agricultural use. Utah Code Ann. § 59-2-506(2).

This penalty is particularly appropriate in the instant case, because Mayflower knew that the South Mountains were not being grazed when the lease payments were reduced. Given Mayflower's failure to notify the County of the change in use, Wasatch County is entitled to recover a penalty on any rollback tax imposed against Mayflower.

CONCLUSION

The Tax Commission erred as a matter of law and fact when it found agricultural use in the South Mountains. As a matter of law, agricultural use does not occur on land where animals occasionally wander, despite the herder's best efforts to prevent such wandering. Factually, the finding is unsupported because no evidence suggests that grazing or other

agricultural activity occurred on the South Mountains. The evidence also does not show where the animals wandered,²⁴ how many animals wandered the property, how often they were there, or how long the wandering lasted. For all these reasons, the Tax Commission committed reversible error when it found that Mayflower proved agricultural use in the South Mountains by a preponderance of the evidence. Correction of this error entitles Wasatch County to judgment awarding it the roll-back tax plus interest and penalties and reinstating the 1993 assessment at full fair market value.

Alternatively, if agricultural use occurred in the South Mountains, then the Tax Commission's finding of compliance is not supported by substantial evidence. The Tax Commission's computation of AUM capacity does not account for all acres grazed and its computation of AUMs used overstates the amount of grazing established by the undisputed evidence. Mayflower thus failed to prove compliance by a preponderance of the evidence. In addition, if the Commission had properly computed capacity and usage under the method it purported to adopt, the result would have been a finding of non-compliance. Thus, the finding of compliance with the 1993 production requirements must be reversed and judgment entered for Wasatch County.

²⁴ In this regard it is worthy of note that Gillmor identified parcels in the South Mountains which could not be grazed. [Tr-B. 27]

DATED this 14th day of August, 1996.

DAN MATTHEWS
Wasatch County Attorney

By: 

Bill Thomas Peters
Joseph T. Dunbeck, Jr.
Attorneys for Wasatch County

CERTIFICATE OF SERVICE

I do hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing BRIEF OF APPELLANT to the following this 14th day of August, 1996:

Craig Smay, Esq.
MOORE & ASSOCIATES
174 East South Temple
Salt Lake City, Utah 84111

John McCarrey
Assistant Attorney General
160 East 300 South
Salt Lake City, Utah 84114

A handwritten signature in black ink, appearing to read "Joseph C. Hunter", is written over a horizontal line.

CERTIFICATE OF SERVICE

I do hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing BRIEF OF APPELLANT to the following this 14 day of August, 1996:

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John McCarrey
Assistant Attorney General
160 East 300 South
Salt Lake City, Utah 84114

Heidi L. Whyatt

Tab A

ADDENDUM A

Utah Constitution

Article XIII §2 (1)

(1) All Tangible property in the state, not exempt under the laws of the United States, or under this Constitution, shall be taxed at a uniform and equal rate in proportion to its value, to be ascertained as provided by law.

Article XIII § 3

(1) The Legislature shall provide by law a uniform and equal rate of assessment on all tangible property in the state, according to its value in money, except as otherwise provided in Section 2 of this Article. The Legislature shall prescribe by law such provisions as shall secure a just valuation for taxation of such property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its tangible property, provided that the Legislature may determine the manner and extent of taxing livestock.

(2) Land used for agricultural purposes may, as the Legislature prescribes, be assessed according to its value for agricultural use without regard to the value it may have for other purposes.

Utah Code Annotated

§ 59-2 502 [pre-1993 version]

(1) “Land in agricultural use” means:

(a) land devoted to the raising of useful plants and animals, such as:

- (i) forages and sod crops;
- (ii) grains and geed crops;
- (iii) livestock as defined in Section 59-2-102;
- (iv) trees and fruits; or
- (v) vegetables, nursery, floral, and ornamental stock; or

(b) land devoted to and meeting the requirements

and qualifications for payments or other compensation under a crop-land retirement program with an agency of the state or federal government.

§ 59-2 502 [post-1993 version]

(1) “Land in agricultural use” means:

(a) land devoted to the raising of useful plants and animals with a reasonable expectation of profit, including:

- (i) forages and sod crops;
- (ii) grains and feed crops;
- (iii) livestock as defined in Section 59-2-102;
- (iv) trees and fruits; or
- (v) vegetables, nursery, floral, and ornamental stock; or

(b) land devoted to and meeting the requirements and qualifications for payments or other compensation under a crop-land retirement program with an agency of the state or federal government.

§ 59-2-503 [pre-1993 version]

(1) For general property tax purposes, the value of land under this part is the value which the land has for agricultural use if the land:

(a) is not less than five contiguous acres in area, except where devoted to agricultural use in conjunction with other eligible acreage or as provided under Subsection (3);

(b) has a gross income from agricultural use, not including rental income, if at least \$1000 per year;

(c) is actively devoted to agricultural use; and

(d) has been devoted to agricultural use for at least two successive years immediately preceding the tax year in issue.

§ 59-2-503 [post-1993 version]

(1) For general property tax purposes, land may be assessed based on the value which the land has for agricultural use if the land;

(a) is not less than five contiguous acres in area, except where devoted to agricultural use in conjunction with other eligible acreage or as provided under Subsection (4);

(b) is actively devoted to agricultural use; and

(c) has been actively devoted to agricultural use for at least two successive years immediately preceding the tax year in issue.

(2) (a) For the purpose of Subsection (1), “actively devoted to agricultural use” means that the land produces in excess of 50% of the average agricultural production per acre for the given type of land and the give county or area.

(b) For the purpose of determining production levels for a given county or area and a given type of land the first applicable of the following established authorities shall be used:

(i) production levels reported in the current publication of the Utah Agricultural Statistics;

(ii) current crop budgets developed and published by Utah State University; and

(iii) other acceptable standards of agricultural production designated by the commission by rule adopted in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act

Tab B

ADDENDUM B

BEFORE THE UTAH STATE TAX COMMISSION

STICHTING MAYFLOWER	:	
RECREATIONAL FONDS, AND)	
STICHTING MAYFLOWER	:	
MOUNTAIN FONDS,)	
	:	
Petitioners,)	FINDINGS OF FACT,
	:	CONCLUSIONS OF LAW,
v.)	AND FINAL DECISION
	:	
COUNTY BOARD OF EQUALIZATION)	Appeal Nos. 93-1672 to 93-1695
OF WASATCH COUNTY,	:	and 93-1784 to 93-1811
STATE OF UTAH,)	Serial No. See attached
	:	
Respondent.)	Tax Type: Property

STATEMENT OF CASE

This matter came before the Utah State Tax Commission for a formal hearing on February 21, 1995. G. Blaine Davis Administrative Law Judge, heard the matter for and on behalf of the Commission. Joe B. Pacheco, Commissioner, was also present to hear much of the proceeding. Present and representing Petitioner was Mr. Craig Smay, Attorney at Law, together with Mr. Arie Bogerd. Present and representing Respondent were Mr. Bill Thomas Peters and Mr. Joseph Dunbeck of the law firm Parsons, Davies, Kinghorn & Peters, and Mr. Dan Matthews, Wasatch County Attorney, together with Mr. Glen Burgener, Wasatch County Assessor.

Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax in question is property tax.
2. The years in question are 1992 and 1993.
3. The use of the subject property for the periods in question was substantially the same as it has been for at least the past ten to fifteen years.

4. The subject property consists of approximately 3,420 acres of undeveloped land located in Wasatch County, which is divided into four general areas which were referred to in the hearing as follows:

A. The North Parcel, which is approximately 657 acres of land which lies north of the Jordanelle Reservoir and State Park, and east of U.S. Highway 40. This parcel has highly varied terrain, which ranges from a portion which is nearly flat to other portions which have slopes with up to 30 percent near the ridge line which runs through the property.

B. The East Park sub-division lots, which are 26 individual lots in the East Park sub-division. That sub-division is located southwest of the north parcel and east of U.S. Highway 40.

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These sub-division lots have been platted and approved, but the property does not have a water system, a sewer system, it has not been fenced, and it contains no curbing or guttering.

C. The density determination area which consists of approximately 1,269 acres in the Mayflower Mountains Ski Resort density determination area. This tract of property runs from the Jordanelle State Park going west across U.S. Highway 40 to the foot of the Deer Valley ski runs. Under the Wasatch County master plan, this tract is approved for 2,074 dwellings as part of a ski resort development, but for the tax years in question, and in fact through the time of the hearing, there had been no development occur on this property.

D. The mountain property, which consists of approximately 1,495 acres which are south and west of the density determination area. Some of this mountain property is isolated and some separate parcels are removed and not contiguous to the bulk of the property. The topography of the mountain property is varied and includes property which is very steep and has rocky slopes, and its elevation ranges from 7,000 feet to 9,400 feet.

5. Beginning in the early 1980's, the property was leased to Gillmor Livestock Corporation for the purpose of grazing livestock, including both sheep and cattle. A later version of the lease between Petitioner and Gillmor Livestock Corporation which was dated February 10, 1988, was introduced into evidence. Even though the written lease had expired, Petitioner and Mr. Gillmor both testified that the lease continued in effect by oral extensions which were agreed to each year by each of the parties. The parties also testified that the lease continued to be in effect through the periods in question in this proceeding, and that it was effective even through the date of the hearing.

6. In 1984, Petitioner filed an application with Wasatch County in which it requested greenbelt treatment for taxation purposes for the north parcel, the density determination area, and the mountain property. That property was granted greenbelt status and it has all remained in greenbelt status from 1984 to 1992.

7. In 1992 the Wasatch County Assessor reviewed the greenbelt status of the subject property and determined that in his opinion the property was not being grazed and was not otherwise

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being used for agricultural purposes. The Wasatch County Assessor, thereafter, terminated the greenbelt status of the subject property and imposed the rollback tax on the property for 5 years, including 1988-1992.

8. The greenbelt status of all properties was being reviewed at that time because of a revision to Utah Code Ann. §59-2-503 which was passed by the 1992 Utah State Legislature to become effective for properties for the 1993 tax year with a January 1, 1993 lien date. The modification of the statute was to require that to be eligible for greenbelt assessment, the property must produce in excess of 50 percent of the average agricultural production per acre for the given type of land and the given county or area. Because the Wasatch County Assessor had previously terminated the greenbelt status for the subject property in 1992, he did not send to the Petitioner the appropriate documents and applications for Petitioner to apply for greenbelt status for 1993. Accordingly, Petitioner was not granted greenbelt status for 1993.

9. Petitioner filed this appeal to challenge:

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A. The termination of the greenbelt status of the subject property for 1992.

B. The imposition of the rollback tax on the subject property.

C. The denial of greenbelt status for the property for 1993.

D. The fair market value of the subject property as of January 1, 1993.

10. Because of the change in the statute for 1993, the case must be reviewed on one basis for 1992 and on a different basis for 1993.

11. Mr. Luke Gillmor, one of the officers of Gillmor Livestock Company testified that from the commencement of the lease to the present time, the utilization of the property has been substantially the same for each and every year since the early 1980's.

12. Gillmor Livestock Corporation is involved in raising both sheep and cattle. The livestock are kept primarily in Salt Lake and Tooele Counties during the winter. The Company owns land

in Salt Lake County, Summit County, and Wasatch County, and a portion of the land owned by Gillmor Livestock Corporation adjoins some of the property leased from Petitioner in Summit County.

13. Gillmor Livestock Corporation moves between 1,200 and 1,500 ewes to the property in Summit and Wasatch County in either late May or early June, depending upon when the snow has melted. In addition to those ewes, there would be approximately 1,300 lambs which would accompany the ewes.

14. Over the years, the sheep have been delivered by trucks and then dropped off from the trucks at the following three general locations; (1) The property in Summit County which is contiguous to the property owned by Petitioner; (2) The Mayflower exit after the completion of the new highway which goes to the Jordanelle dam; and (3) Near the south main property which is outside of the density determination area.

15. After the sheep were dropped off at one of the above locations, the sheep would be tended by a sheepherder and would be driven from that location to the desired grazing areas by the sheepherders and would then be left to wander wherever they might

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go. There were no fences to separate the property during most of the time. The cattle might have wandered not only on the leased property, but onto other publicly owned property, although efforts were made to try to keep them on the subject property.

16. Sometime during the period 1987-1989, Gillmor Livestock Corporation ceased delivering sheep to the south main property which is outside of the density determination area. They did so because of the problems relating to the encroachment of civilization, including problems with sheep wandering onto private property, and problems with dogs owned by persons on the private property coming to the south main property and killing the sheep. Nevertheless, Gillmor Livestock Corporation continued to have a legal right to use that property if it wanted to, and some of the sheep or cattle may have wandered onto that property from the other property.

17. The sheep grazed on the property from late May or early June until sometime near the middle to the end of July. The sheep would then be moved by truck from the subject property to the

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summer range which is higher in elevation and located a substantial distance from the subject property.

18. After the sheep are removed from the subject property near the middle to the end of July, then between 100 and 300 head of cattle are placed on the property, together with their calves. Mr. Gillmore estimated that the average number was 200 head of cattle plus their calves. The cattle would remain on the property for most of the rest of the summer.

19. The sheep would be returned to the subject property in early October, and would remain there until the middle or later part of November, when they would be returned to Salt Lake County and some to Tooele County.

20. The parties have stipulated to the amount of land and the fair market value of that land, and the stipulation of the parties is as follows:

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VALUES PER ACRE/LOT, AND TOTAL VALUES AS OF 1/1/93

NORTH PROPERTY

<u>SIZE</u>	<u>VALUE PER UNIT</u>	<u>TOTAL FAIR MARKET VALUE</u>
0.71 acres		\$ 2.00
656.46 acres	\$1,500.00	\$984,690.00

EAST PARK LOTS

25 Lots	\$12,000.00	
1 Lot	\$23,000.00	\$ <u>323,000.00</u>

SOUTH MAIN WITHIN THE DENSITY DETERMINATION

1,268.23	\$3,400.00	<u>\$4,311,982.00</u>
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SOUTH MAIN WITHOUT THE DENSITY DETERMINATION

1,390.11	\$1,100.00	\$1,529,121.00
<u>105.00</u>	\$ 900.00	<u>\$ 94,500.00</u>
1,495.11		<u>\$1,623,621.00</u>

TOTAL

3,420.51 Acres plus 26 Lots		<u>\$7,243,295.00</u>
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21. The subject property is classified for agricultural purposes as Graze II land. For 1993 and subsequent years thereafter, the requirement which has been established for graze II land is .63 animal unit months (AUM'S) per acre. For 1992, the

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legal requirement was not based upon AUM'S, but instead, the total property was required to produce a gross income from agricultural use of at least \$1,000.00 per year. In addition, for both 1992 and 1993, there were general requirements that the property must be not less than five (5) contiguous acres in area, must have been actively devoted to agricultural use, and had been devoted to agricultural use for at least 2 successive years immediately preceding the tax year in question.

22. For both 1992 and 1993, the Commission specifically finds that the subject property is not less than 5 contiguous acres in area, is actively devoted to agricultural use, and has been actively devoted to agricultural use for at least 2 successive years immediately preceding the tax year in issue.

23. For 1992, the subject property had a gross income from agricultural use of more than \$1,000.00.

24. For 1993, including the 3,420 acres owned by Petitioner, and the additional acreage owned by Gillmor Land and Livestock, the AUM requirements would have been 1,485 AUM'S. That is based on a total of 4,714 acres at .63 AUM'S per acre, for a

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total allowance of 2,970 AUM'S. Because the greenbelt law requires that the actual production of the property be at least 50 percent of the adopted standard, then 50 percent of 2,970 equals 1,485 required AUM'S. (Exhibit 119).

25. Gillmor Livestock Company grazes approximately 1,500 sheep on the property for a period of four months, and 175 cows for a period of 3 months. That means that the properties are utilized for 1,725 AUM'S. (Exhibit 119).

26. The actual usage for the property for grazing purposes to qualify as agricultural use exceeds 50 percent of the average agricultural production per acre for the given type of land and the given county or area.

APPLICABLE LAW

The Tax Commission is required to oversee the just administration of property taxes to ensure that property is valued for tax purposes according to its fair market value. (Utah Code Ann. §59-1-210(7).)

For 1992, the qualifications to qualify for taxation pursuant to the farmland assessment act (greenbelt) are as follows:

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A. The property must be not less than five contiguous acres in area, except where devoted to agricultural use in conjunction with other eligible acreage;

B. The property must have a gross income from agricultural use, not including rental income, of at least \$1,000 per year;

C. The property must be actively devoted to agricultural use;

D. The property must have been devoted to agricultural use for at least two successive years immediately preceding the tax year at issue.

For 1993, the requirements for the property to qualify for taxation pursuant to the farmland assessment act (greenbelt), are as follows:

A. The property must be not less than five contiguous acres in area, except where the property is devoted to agricultural use in conjunction with other eligible acreage;

B. The property must be actively devoted to agricultural use;

C. The property must have been actively devoted to agricultural use for at least two successive years immediately preceding the tax year in question.

D. For the property to meet the requirement of being "actively devoted to agricultural use," the land must produce in excess of 50 percent of the average agricultural production per acre for the given type of land and the given county or area.

Petitioner has the burden of proof to establish that the market value of the subject property is other than that as determined by Respondent, and also has the burden of proof to establish the correct fair market value of the subject property.

CONCLUSIONS OF LAW

The Petitioner has sustained the burden of proof to establish the market value of the subject property is other than that previously established by respondent, and the parties have stipulated to the fair market value of the subject properties.

Petitioner has established by a preponderance of the evidence that for both 1992 and 1993 the subject property qualifies

Appeal No. 93-1672

for treatment for ad valorem taxation purposes pursuant to the farmland assessment act (greenbelt).

DECISION AND ORDER

Based upon the foregoing, the Tax Commission finds that the fair market values of the subject properties as of January 1, 1993 are as follows: Both parties have stipulated and arrived at the totals mentioned above, which is \$7,243,295.00.

The Commission has also reviewed the issues relating to the greenbelt valuation of the subject property, and while it is clear that there has been a reduced agricultural usage of a portion of the south main property which occurred in either 1987 or 1989, the Commission cannot find that there has been a change in use of the property. It is true that substantial agricultural use has occurred on the property owned by Petitioner, that the entire portion of the property is available for Gillmor Livestock Corporation to use, and Gillmor Livestock Corporation has a lease on the property which specifically provides for its use as agricultural property. There are no fences or other physical prohibitions preventing Gillmor Livestock Corporation from

Appeal No. 93-1672

utilizing that land, and there are no legal restrictions to prohibit them from using that land for agricultural purposes.

Accordingly, in the view of the Commission, for the year 1992, the subject properties complied with §59-2-503, Utah Code Ann., in that they had more than five contiguous acres, had a gross income from agricultural use in excess of \$1,000 per year, and the properties were to a substantial degree devoted to agricultural use and have been devoted to that same use for at least two successive years immediately preceding the tax year in question. Therefore, the Commission determines that for 1992, the properties in question qualified for ad valorem taxation pursuant to the farmland assessment act (greenbelt) provisions of Utah State law.

For 1993, the Commission also determines that even though there are questions regarding a portion of the south main property and its usage, that when the total property is reviewed in comparison with the required animal unit months (AUM'S) for grazing, that Gillmor Livestock Corporation grazed sufficient sheep and sufficient cattle on the property for a sufficient length of time for all of the property to qualify under §59-2-503, Utah Code

Appeal No. 93-1672

Ann., as amended by the 1992 legislature. Specifically, the Commission finds that the property is more than five contiguous acres in area, was actively devoted to agricultural use by meeting the requirement of at least 50 percent of the average agricultural production for Graze II property, and had been so actively devoted to agricultural use for at least two successive years immediately preceding the tax year in question.

Based upon the Commission's determination that the property qualified for ad valorem taxation pursuant to the farmland assessment act (greenbelt), the Commission also determines that the property did not go through a change in use and that therefore, the imposition of the rollback tax upon the property was improper and should not have been imposed by respondent. The Commission therefore orders that the rollback tax be removed. Respondent is also ordered to place the subject properties of Petitioner on the tax rolls as property qualified for assessment pursuant to the farmland assessment act and to impose the taxes for 1992 and 1993 at the rate applicable to such property by the farmland assessment

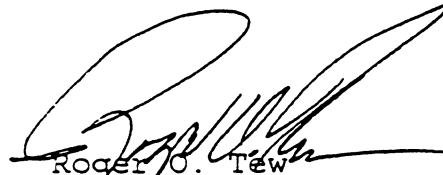
Appeal No. 93-1672

act. The Wasatch County Auditor is hereby ordered to adjust its records in accordance with this decision. It is so ordered.

DATED this 25th day of August, 1995.

BY ORDER OF THE UTAH STATE TAX COMMISSION.

W. Val Oveson
Chairman

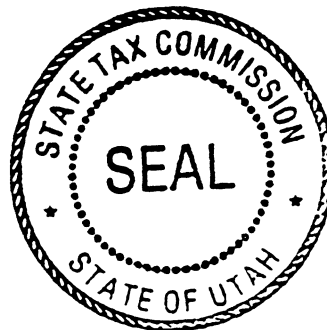

Roger O. Tew
Commissioner


Joe B. Pacheco
Commissioner


Alice Shearer
Commissioner

NOTICE: You have twenty (20) days after the date of a final order to file a Request for Reconsideration with the Commission. If you do not file a Request for Reconsideration with the Commission, you have thirty (30) days after the date of a final order to file a.) a Petition for Judicial Review in the Supreme Court, or b.) a Petition for Judicial Review by trial de novo in district court. (Utah Administrative Rule R861-1-5A(P) and Utah Code Ann. §§59-1-601(1), 63-46b-13(1), 63-46-14(3)(a).)

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Tab C

ADDENDUM C

BEFORE THE UTAH STATE TAX COMMISSION

STICHTING MAYFLOWER)	
RECREATIONAL FONDS, AND	:	
STICHTING MAYFLOWER)	
MOUNTAIN FONDS,	:	
)	
Petitioners,	:	ORDER
)	
v.	:	
)	
BOARD OF EQUALIZATION	:	Appeal Nos. 93-1672 to 93-1695
OF WASATCH COUNTY)	and 93-1784 to 93-1811
STATE OF UTAH,	:	
)	
Respondent.	:	Tax Type: Property

STATEMENT OF CASE

This matter came before the Utah State Tax Commission upon a Petition for Reconsideration, dated September 14, 1995, filed by Respondent as a result of the Commission's Final Decision dated August 25, 1995.

Petitioner filed a Motion to Dismiss the Petition for Reconsideration on the ground that the Commission had lost jurisdiction because the matter had been appealed to the Utah Supreme Court. However, the Utah Supreme Court has specifically

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entered an Order staying the proceeding until the Utah State Commission has entered a final ruling on the Petition for Reconsideration.

Accordingly, it is hereby ordered that the Motion to Dismiss the Petition for Reconsideration filed by Petitioner herein is hereby denied.

Oral arguments were heard on the issue of whether the Petition for Reconsideration should be granted, and such hearing was January 22, 1996. G. Blaine Davis, Administrative Law Judge, and Joe B. Pacheco, Commissioner, heard the matter for and on behalf of the Commission. Petitioner was represented by Mr. Craig Smay, Attorney at Law, together with Mr. Arie Bogerds. Respondent was represented by Mr. Joe Dunbeck, from the Law Firm Parsons, Davies, Kinghorn and Peters.

Respondent's Petition for Reconsideration was based upon two alleged errors in the ruling. Respondent alleges that it was error to find that the South Mountains were actively devoted to agricultural use under the pre-1993 or post-1993 Greenbelt Statute. The Petition for Reconsideration also alleges that it was error to find that the agricultural use of the entire Mayflower property satisfied the AUM (Animal Unit Months) requirement of the post-1993 statute.

Regarding the first allegation that the South Mountain area was not actively devoted to agricultural use under either the pre-1993 or the post-1993 Greenbelt Statute, the Commission recognizes that there was significantly diminished use for the South Mountain area beginning in approximately 1989. However, notwithstanding such diminished use, it is still clear that all of the subject property, including the South Mountain area was included in the property which was leased to Gilmore Land and Livestock Company, and upon which they grazed substantial numbers of cattle and sheep. There were no fence lines to prohibit the cattle and sheep from grazing on all of the property, including the South Mountain area. In fact, there was testimony that the animals did occasionally graze that area, although Mr. Gilmoor did attempt to keep them from the area because of the encroachments of civilization, including dogs which chase the animals. Further, there was never a dispute that the property produces at least \$1,000 in gross revenue from agricultural product. Therefore, the Commission believes that its decision was correct relating to the South Mountain property for the pre-1993 period.

With respect to the post-1993 Greenbelt Statute, the Commission also believes that its decision is correct. Although the Respondent has argued that there were not sufficient AUM's

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established to provide the exemption for all of the property, that is based upon the Respondent's own interpretation of the facts. The Petitioner clearly established that there were a sufficient number of animals grazed on the property to satisfy the statutory requirement for the property at issue in this appeal, which requires the property produce in excess of 50% of the agricultural production per acre for the given type of land and the given county or area.

Respondent desires to have substantial additional property included in the calculation, because Mr. Gilmore drew a "peanut" which included a substantial amount of acreage not under lease to Gilmore Land & Livestock, even though his sheep and cattle were sometimes on that other property. However, there is no showing as to what the agricultural classification of that additional land, and the amount of acreage used by Petitioner was merely based upon a rough drawing on a large map. Even if all of the additional land which Respondent claims should be included in the AUM calculation is included, the Petitioner is very close to being able to satisfy the statutory requirement for all of the land. Nevertheless, where there is not a sufficient showing as to the amount of such additional land, or the classification of such land, and where Petitioner also comes very close to satisfying the requirement for all of the land, the

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Commission is not willing to include such additional areas in its calculation. Therefore, based upon the calculation for just the land that is at issue in the proceeding, and the number of animals grazed on the land, the Petitioner clearly meets the AUM requirements for the post-1993 Greenbelt Statute.

APPLICABLE LAW

Utah Administrative Rule R861-1-5A(P) provides that a Petition for Reconsideration "will allege as grounds for reconsideration either a mistake in law or fact, or the discovery of new evidence." Under this rule, the Tax Commission may exercise its discretion in granting or denying a Petition for Reconsideration.

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DECISION AND ORDER

Based upon the foregoing, it is the decision and order of the Utah State Tax Commission that the Petition for Reconsideration filed by Respondent is herein denied. It is ordered.

DATED this 9th day of February, 1996.

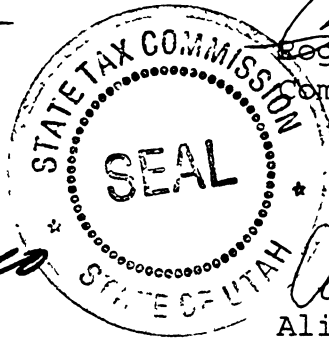
BY ORDER OF THE UTAH STATE TAX COMMISSION.



W. Val Oveson
Chairman



Roger O. Tew
Commissioner



Joe B. Pacheco
Commissioner



Alice Shearer
Commissioner

NOTICE: You have thirty (30) days after the date of a final order to file a.) a Petition for Judicial Review in the Supreme Court, or b.) a Petition for Judicial Review by trial de novo in District Court. (Utah Administrative Rule R861-1A-5(P) and Utah Code Ann. §§59-1-601(1), 63-46b-13 et. seq.)

Tab D

ADDENDUM D

1 EDWARD L. GILLMORE, JR.,
2 called as a witness by and on behalf of the petitioners in
3 this matter, after having been previously duly sworn, was
4 examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. SMAY:

7 Q Mr. Gillmore, if you would, please, would you give
8 us your full and correct name?

9 A Edward L. Gillmore, Jr.

10 Q And the L. is for?

11 A Leslie.

12 Q And you are called Luke because?

13 A Nickname my dad gave me.

14 Q But you are the Luke Gillmore to whom we have been
15 referring earlier in the matter?

16 A Yes.

17 Q Tell us where you live, Mr. Gillmore.

18 A 617 East 1650 South, Bountiful.

19 Q And what is your occupation?

20 A Livestock producer.

21 Q How long have you been occupied in the production of
22 livestock?

23 A All my life.

24 Q When you say livestock, what sort of animals are you
25 referring to?

1 than there is--this ground to the west between Deer Valley,
2 especially, like in this Section 14 and 23, there's no water
3 that I know of at all on either--on most of those two
4 sections. Almost every bit of that property, that steep
5 property, you can see there, is--is dry.

6 Q Would you be able to provide the animals sufficient
7 water without the use of the Mayflower properties?

8 A Absolutely not.

9 Q There is an old railroad right-of-way, are you
10 familiar with it, that runs between the Mayflower north
11 property and the Mayflower south property?

12 A Yes.

13 Q Do you use that to move the cattle between the two
14 places?

15 A Yes. The cattle and sheep, both, we use it.

16 Q Okay. If the sheep and the cattle, in the course of
17 that movement, cross lands that belong to someone other than
18 Mayflower or the Gillmores, has anybody attempted to stop you
19 or to restrict those movements?

20 A No.

21 Q Looking at the property which is toward the bottom
22 part of the drawing which is Exhibit D-1, you will see some
23 that's shaded in blue; do you see that?

24 A Yes.

25 Q And it's described here as Mayflower properties

1 other. Are you familiar with that property?

2 A Yes.

3 Q Can you describe what the topography is there for
4 us?

5 A Part of it is very steep and there's almost no water
6 on it whatsoever.

7 Q At the top of that property is an area which on the
8 map shows as Bonanza Flat; are you familiar with that--

9 A Yes.

10 Q --area? What is that area like?

11 A This, when you get up and on the west part of this
12 blue shaded area, and over on what the--it says Lone Hill on
13 this Bonanza Flat is more of a gentle slope, rolling meadows.
14 And when you get off this blue shaded area, the--the Midway
15 Reservoir is right, real close to the line. And then over in
16 here, there is some creeks and streams on this Bonanza Flat.

17 Q In an ordinary year, do you move the sheep up that
18 mountainside towards Bonanza Flat?

19 A We haven't been, for a number of years.

20 Q And why has that been the case?

21 A We had a lot of problems when we had the sheep up
22 there with--first of all, there's--there's only one small
23 spring on this blue area, that's not sufficient to water a
24 large herd of sheep and the sheep have to go off, like at this
25 Midway Reservoir or somewhere. And we had--it was hard to

1 keep the sheep on there, and--but more so, we had a lot of
2 problems with wild--or domestic dogs that were coming up from
3 Park City and attacking the sheep.

4 Q Okay.

5 A And then also, we, as time went on, from this State
6 park, there's a lot of people up there and a lot of people use
7 this property for recreation and it's--it's hard to graze the
8 sheep in there when there's so many people just doing all
9 sorts of different type of recreational activities.

10 Q When did that, (inaudible) you've just described,
11 the dogs, for example, or the people engaged in recreational
12 activities, when did that become a serious interference with
13 putting sheep up in those areas?

14 A Well, it was, right at the time when we had the
15 sheep up there in the--in the latter part of the '80's, and
16 it's just--it--the last couple years that we actually had the
17 sheep camp up there and it became so we figured it was more
18 problem than it was worth to try and graze on it. With the--
19 you know, with the whole herd.

20 We still have stock that periodically have come up
21 onto the--came up these canyons, especially sheep, because
22 sheep's natural tendency is to climb up and through all the
23 years, we've periodically had to come up onto this blue area
24 and bring back sheep that have strayed off and gone up.

25 Q Gone up on their own?

1 A Yes.

2 Q You said a moment ago, you had a sheep camp
3 somewhere in that area; can you tell us generally where that
4 was?

5 A On the blue area?

6 Q Correct.

7 A Yes. There's a--we'd come up from--through--go
8 through Park City and come up this road that goes over
9 Guardsmen's Pass and then come on to Bonanza Flat, and there's
10 a road that comes down through here and--well, this, you can
11 see it, it comes around, and we'd camp on this wheel track,
12 this Jeep trail on this ridge right here.

13 Q The ridge that appears on drawing, along--roughly
14 between Section 33 and 34?

15 A Yes.

16 Q When was the last year you maintained the--you
17 maintained the sheep camp in that vicinity? If you recall.

18 A I believe it was '86 or '87, but I'm not dead sure;
19 I know that was close.

20 Q Okay. When you have--well, let's back up a moment.
21 After discontinuing the sheep camp there, have you re-
22 instituted it during any particular year?

23 A No. There's--since that time, we--I haven't had a--
24 or I'm--before that time, I was paying the Mayflower for the
25 use of this property and after--since that time, I--I haven't

1 been.

2 Q Okay. What do you regard yourself as paying them
3 for today? This is--is this property within your lease today,
4 as you understand it?

5 A Yeah, I--yes, it is, as far--with the understanding
6 that it's very difficult to use and the payment that I was
7 making on those years when we had this sheep camp on it all
8 summer long, it's been our--the understanding between me and
9 the Mayflower that we wouldn't make that extra payment.

10 Q For maintaining the sheep camp there?

11 A Right. In other words, those years that when we
12 have the sheep camp up here, we didn't--those sheep that were
13 up here didn't move off and go up to our private summer range,
14 they stayed here all summer.

15 Q Okay. Now when sheep get into this area, what
16 becomes of them?

17 A Well, we go get them and take them back down onto
18 this other property.

19 Q How often does that occur?

20 A Not real often, as it depends on how good our herder
21 is, or how good I--or how good we--we herd them, ourselves.

22 Q Over the last few years, Mr. Gillmore, is there a
23 way of estimating how many sheep there would have been grazing
24 in that upper blue area from time to time?

25 A Well, it's hard to put an exact figure on it,

1 because it's just periodically different bunches that go up
2 there and then they're--as soon as we find out they're gone,
3 we go get them and--and take them back down, so...

4 Q Some of the pieces that are shown here in blue are
5 not physically contiguous; did that ever prevent you using
6 those areas?

7 A Not the contiguous part. There--this--these pieces
8 down here are in a real steep, treacherous canyon area and
9 it's hard to get the sheep on to them, and I think it's--
10 they're pretty limited grazing value.

11 Q Are those still within the lease that you're
12 operating under today?

13 A Well, it's my understanding all the property is
14 described in the lease.

15 Q Do you recall where, on this map, Mr. Gillmore, the
16 old Star Mine tunnel is located?

17 A Yes. It would be here in Section 26.

18 Q Has that been--has there been a sheep camp at that
19 site in the past, that you recall?

20 A No. We've usually had the sheep camp down here,
21 when it's been over in that area, we've had the camp down here
22 by the Mayflower mine.

23 Q And the Mayflower mine is down in Section 25 that
24 we're talking about?

25 A That's right.

1 Q Once the sheep have been on the property--well, let
2 me back up just a moment. The sheep are there until about
3 when, each year?

4 A Usually some time in November, again, depending on
5 the weather.

6 Q Okay. And when that time comes, where do the sheep
7 go?

8 A They go back out to Tooele and Salt Lake Counties.

9 Q Is there a time during the year when you put cattle
10 on that property?

11 A Yes.

12 Q And when does that generally occur?

13 A Well, the way--the last three or four years, it's
14 been generally in the fall or in the late summer.

15 Q About what month of the year, do you recall?

16 A September, late August.

17 Q And how many cattle do you put on--excuse me--do you
18 put on the property?

19 A We've had approximately a hundred head of--from a
20 hundred to 300 head of cattle, counting their calves in that--
21 in this Mayflower area.

22 Q Okay. Is it the same proportion of calves to cows
23 as it is lambs to sheep?

24 A No.

25 Q Okay. How--how many cows then, or older animals, I

1 suppose, would you have, as opposed to how many calves would
2 you have?

3 A Well, for sure, you'd never have more calves than
4 you do cows, because the cows very seldom have twins; so, if
5 you have 50 cows, you'd probably 45 calves or--as an example.

6 Q And if the number of animals was the 300 you cited,
7 that you be roughly--

8 A Yeah. Maybe 160 or 70 cows and 130 calves.

9 Q When are calves born during the year?

10 A In March.

11 Q So, the animals that you move onto this area, the
12 calves you move on in--did you tell me September?

13 A Yes.

14 Q Are about how far grown?

15 A Oh, four or five months.

16 Q And where do you put the cows when you bring those
17 up? The cattle, when you bring those up?

18 A We have pastures down on this other property I
19 referred to in Section 2 and 3 and 34 and we usually have
20 unloaded the cattle in that--in those pastures, in that area,
21 and then later, move the cattle over onto this Mayflower
22 property, and then we've brought other cattle back from the
23 summer range, in the fall and mixed them all together in this
24 Mayflower area.

25 Q When you refer to the Mayflower area, which

1 particular part of the Mayflower property are you referring
2 to?

3 A Well, all of it, but the--all the property that
4 we're still using that's not--that wasn't condemned by the
5 Bureau of Reclamation.

6 Q And when you said you brought other cattle from the
7 summer range, that does increase the numbers that you were
8 testifying to a moment ago?

9 A Well, that's what brings it up in the 300 range,
10 yes.

11 Q Do the cattle move across this property in any
12 particular pattern over the course of a season?

13 A In the fall, yes, they--we have cattle--again,
14 they're all--they're basically on the same area as the sheep
15 are in the spring, they--they're all over the Clark Ranch and
16 the north property and then down onto this Mayflower Mine area
17 and this area around the Mayflower exit.

18 Q And has that been the case on a yearly basis, as far
19 as you can recall?

20 A Yes.

21 Q Any year, in your recollection, in which that didn't
22 occur?

23 A No. There hasn't been a year, since we've been
24 leasing the property that there hasn't been cattle and sheep
25 grazed. The only difference would be going back more than

1 three or four years, we've taken cattle and unloaded them in
2 this Ketley area and we've unloaded cattle in--down by
3 Hailstone; but they've essentially wound up grazing the
4 property the same, regardless of where we unloaded them.

5 Q Looking at the blue area on this map that we've
6 described before, the more mountainous terrain extending up
7 toward Bonanza Flat; do the cows use that property for
8 grazing?

9 A Very little. But cattle do sometimes climb up these
10 canyons.

11 Q What do you do when that happens?

12 A Well, we usually get a phone call, like from Deer
13 Valley and have to go--to go get them and drive them back.

14 Q Having that as--changing the subject then of your
15 relationship of other owners in the vicinity; the more
16 easterly part of the Mayflower property has been--excuse me,
17 the more westerly part has been condemned by the Federal
18 Government.

19 A Easterly part.

20 MR. DUNBECK: Easterly.

21 Q (By Mr. Smay) Easterly part; am I getting--yes, I'm
22 getting my directions backward. All right.

23 Have you had then, a relationship between yourself
24 and the Federal administrators down on that property with
25 respect to using it, for example, for sheep?

1 have been?

2 A Would have been over twice--or I mean, it would have
3 been almost twice what the numbers I've been--

4 Q In any of the years that we've referred to, Mr.
5 Gillmore, 1988 through 1993, given your experience as a
6 herdsman, your familiar with that kind of property, and that
7 particular property; in your view, was the property
8 substantially under-used in any particular year?

9 A No.

10 Q If you had to pick a percentage as to the amount of
11 agriculture use that property was sustained for grazing and
12 the amount that occurred, what percentage of the use do you
13 think occurred in those years?

14 A Well, we tried to use the property as--to the full--
15 at the amount that it was practical to use it and after the
16 condemnation and the highway went in, there's--it's--the whole
17 lease, of course, changed, there was a lot of the best
18 property to the east that we, of course, didn't--couldn't use
19 any more because it was taken by the Bureau of Reclamation;
20 but as far as grazing capacity is concerned, it hasn't changed
21 at all. There is no--on the ground that we still are grazing
22 now, we're using it in the exact same manner as we were using
23 it before, only there's only half as much--we're only us--
24 like--if you figured it like in AUMs, it would be only half
25 the--half as much as it was like '88 or prior because of this

1 property we lost--or the property that was taken by the Bureau
2 of Reclamation and--and--

3 Q Looking at the remainder of the property, excluding
4 the part that was taken by the government, and excluding the
5 part that's leased to Deer Valley, have you grazed that
6 property at, to your understanding, substantially less than
7 its capacity to graze animals in any particular year?

8 A Not any of this area in the white, no, that's still
9 possible to use. We've used everything in these white areas
10 and--well, we've had to use it, there's been no--we have those
11 period of times when you have that many livestock up there,
12 they have to--they have to be moved around to a certain
13 extent, to a great extent, they move around, of course,
14 theirselves (sic), when you have a large herd like that.

15 No, there's--there is absolutely no substantial
16 difference in the way those properties, or our own, of course,
17 up there, is--you--there isn't a substantial difference
18 between '93, '83 or '73.

19 Q Okay. Looking at the property which is in blue on
20 this drawing, as it becomes steeper and moves up the
21 mountainside toward Bonanza Flat, am I getting that right?
22 Over the last of the years we've recounted, '88 to '93, Mr.
23 Gillmore, given what the capacity of that land is for grazing
24 animals, whatever it is, has that property been used at
25 substantially less than its capacity to graze animals?

1 A Now, you're speaking around the Mayflower Mine and
2 down below here, not the--the blue property?

3 Q No. I understood your testimony about the lower
4 properties. Looking at the upper properties, maybe it's
5 easier to begin with the question whether or not you regard
6 the capacity of this land, the part which is shaded in blue
7 there, to sustain grazing as in some degree lesser than the
8 capacity of the remainder of the land to sustain grazing?

9 A Well, the--the land, itself, of course has not
10 changed at all, it still grows the same amount of feed as it
11 did ten or 20 years ago; the--but the conditions, the grazing
12 conditions have substantially changed in the last ten years.

13 Q And has that affected--

14 A Absolutely.

15 Q --the capacity of that land to sustain grazing in
16 your view?

17 A It absolutely has, yes.

18 Q Given whatever its reduced capacity then is to
19 sustain grazing, have you used it at less than that reduced
20 capacity over the last five years?

21 A Well, that--

22 MR. DUNBECK: Go for it, Luke.

23 Q (By Mr. Smay) But does that question make sense to
24 you?

25 A No. It hasn't been used very much, in other words.

1 Q Has the amount to which it has been used fallen
2 below 50 percent of the amount to which it could have been
3 used, had you been--

4 A Well, it's not--hasn't been practical to use it to
5 any substantial amount, so...

6 Q And the reason for that is what?

7 A Because of the problems that I stated before, about
8 the recreation and the dog problems in Park City.

9 Q Mr. Bogerd has earlier testified, Mr. Gillmore,
10 respecting a conversation with you in which you asked him for
11 notices received from counties in which you grazed indicating
12 some change in the law as of 1993; do you recall a
13 conversation like that with Mr. Bogerd?

14 A Yes.

15 Q Do you recall about when it may have occurred?

16 A Yes. I believe it was in the spring of '93.

17 Q And what did you ask Mr. Bogerd at that time?

18 A I'd asked him about affidavits that--or asked him if
19 he'd received affidavits for the change in the Greenbelt law
20 because I--or Gillmore Livestock had been asked to sign a
21 number of them for--for other land owners in Summit and Salt
22 Lake Counties.

23 Q Had you received any for properties in Wasatch
24 County that you can recall?

25 A I believe my uncle did for the property he did--for

1 object.

2 THE HEARING OFFICER: Received.

3 MR. DUNBECK: Thank you.

4 Q (By Mr. Dunbeck) Okay. I guess I'd ask you to step
5 up here with me. (Inaudible) In the typical year, you begin
6 breaking the sheep up in mid-May to early June, from the
7 ranges out here by the Salt--Salt Lake International Airport;
8 is that correct?

9 A Yes.

10 Q And you bring them up in truck loads, and I can't
11 remember, how many animals are in a truck load?

12 A It'll hold approximately 300 ewes.

13 Q And lambs?

14 A No. Three hundred ewes and then if they have lambs,
15 then smaller units.

16 Q Okay. And so it takes you awhile to bring the
17 animals up from the--from the winter range; is that correct?

18 A Yes.

19 Q Okay. Now, I've got on the board here a--two
20 typographical maps which I've kind of hooked together, which
21 I'll represent to you are Exhibit 2 and 3 from your deposition
22 when we talked about where you grazed and dropped your animals
23 off. For the purposes of this discussion, we have some
24 markings that are up at the top and we'll come back to those
25 because I think those are the areas in which you identified

1 your additional acreage and we'll cover that in a minute.

2 Where--where do you typically drop off your sheep
3 when you start bringing them up and I'd like to focus on the
4 time period after which the first kind of construction began
5 on the--on the highway?

6 A Since the condemnation, we've been, of course
7 haven't been able to unload down on this Hailstone area, so
8 our--this--the only places we've been able to get to with our
9 truck is either here or up in this area here.

10 Q Okay. The first area, or this--actually, the second
11 area you identified was in the Richardson Flat area and
12 there's a blue X on the map; does that roughly represent where
13 you drop off some of the sheep? And this is in the spring?

14 A Yes.

15 Q And then if you look down in Section 24 here, you
16 can see that there's a blue X near something called McKeown;
17 is that another place that you typically drop the sheep off?

18 A Yes.

19 Q And is it your testimony that you divide the sheep
20 roughly in half between these two locations?

21 A Yes. Initially.

22 Q Uh huh, when you first bring them in--in this area?

23 A That's correct; but many times, they're not divided
24 in half for very long.

25 Q Okay. But in the--the X that you've placed on--in

1 Section 24, the blue X there, that's roughly where the
2 Mayflower passes; isn't that correct?

3 A That's correct.

4 Q Okay. So, we would have--look real quick at my
5 charts, but we would have roughly--roughly 600 to 750 animals
6 in each one of these locations where we start dropping them
7 off?

8 A That's correct.

9 Q Counting the sheep and lambs. Okay. Now, we talked
10 about the cattle coming in; from what direction do the cattle
11 come in? The 50 head we identified as the first bunch, I
12 believe; where do they come from?

13 A They come--come--these properties we have over here
14 in Summit County here--

15 Q Uh huh.

16 A --outlined with the brown, are fenced pastures and
17 the cattle are enclosed in those, and we move--we move them
18 across the--you know, this is all new highway now, but this--
19 there's a big interchange here and we move them down these
20 roads and then over, and the cattle come--here's the Clark
21 Ranch, and there's some Jeep trails that come down through
22 here and the cattle come down through that. We have--of
23 course, there's some cattle that come back around and get onto
24 this area here.

25 Q Okay. You've marked here your rough approximation

1 of where the new U.S. 40 was; isn't that correct? Okay. Then
2 what is the orange--the orange circle that I have that you
3 drew in here, isn't--doesn't that represent the typical range
4 that you use with the cattle and sheep during the time periods
5 that we've identified?

6 A Yes.

7 Q Can you see Bonanza Flats on here?

8 A It's just barely off the map, I believe. It's not
9 here.

10 Q Is it over in Summit County?

11 A The line goes right through it; part of it is and
12 part of it isn't, as I recall.

13 Q Okay. You have not been able to use your camp site
14 in Bonanza Flats since, I think you said approximately 1987,
15 is that right?

16 A Well, by my check, it might be '89.

17 Q Okay. But it would have been--probably would not
18 have been later than that?

19 A Yeah. That's the way I recall.

20 Q And the problem that you had in grazing up in that
21 area was that you started bumping into the developments to the
22 west and the park to the south?

23 A Actually to the north is where the--this property,
24 this Mayflower property up here, is actually very close to
25 this--literally next door now, to Park City itself. All this

1 Deer Valley area here has been developed with new subdivisions
2 and that's where--where this--this new development that's gone
3 in in this area here is where the problem with these dogs is
4 coming from.

5 Q Okay. After we get them here and grazing in the
6 spring, then you made an orange line showing how they exit out
7 and you trail them out towards--is this the South Fork?

8 A To the Weber.

9 Q Yeah, but to the South Fork of the Weber. Okay.
10 Let me--if you would stand there, and if it helps you, if not--
11 -during Mr. Smay's discussion with you, you began identifying
12 acreages which you used--and before we start that, could you
13 identify for the Court and maybe even mark it, that would be
14 helpful, mark it in blue where the Wasatch County-Summit
15 County line is there. Okay.

16 Now, when you were testifying before, you were
17 describing the additional acreage in Summit County which you
18 used in connection with the--the grazing of the livestock
19 property and I'd just like to make a note of the acreages that
20 you identified. What additional acreages does your family own
21 or lease in Summit County?

22 A Oh, probably approximately 1,800 acres.

23 Q That's--that's sufficient. Okay. And those 18--
24 additional 1,800 acres are used in connection with the
25 operation you described in connection with the Mayflower

1 property?

2 A Yes.

3 Q Okay. And--

4 THE HEARING OFFICER: Let me just interrupt on that;
5 do you have any other relatives using, or who graze additional
6 animals on any of those acres?

7 THE WITNESS: Not on these--

8 THE HEARING OFFICER: Okay.

9 THE WITNESS: --acres, your Honor, but on contiguous
10 other acres here, we do; but not on these 1,800.

11 MR. DUNBECK: I object. We have the--we start
12 getting the whole Gillmore family tree of grazing up there.

13 THE HEARING OFFICER: I just--I can see where you're
14 going and I want to make sure we have a match of animals and
15 acreage.

16 Q (By Mr. Dunbeck) Now, so the answer to the question
17 is that the animals that we've discussed before are grazing on
18 these acres in Summit County?

19 THE HEARING OFFICER: And that's your testimony; is
20 that right?

21 THE WITNESS: Yes.

22 Q (By Mr. Dunbeck) The Summit County acreage that you
23 identified is both leased and fee owned?

24 A Yes.

25 Q Okay. You own a little bit additional in Wasatch--I

1 don't know if that's spelled right or not--Wasatch County
2 that's separate from the Mayflower property; isn't that
3 correct?

4 A Yeah. I included that in that--

5 Q Oh, up there?

6 A All of it--

7 Q Okay.

8 A As well--and I--

9 Q How much--how much do we reduce this one by then?

10 A Well, it--my answer for that on second thought was,
11 I was thinking 800 acres, because that's approximately how
12 much my dad owned, and that's how--and my uncle had the same;
13 so actually, that should have been 1,600 for this total area,
14 including Wasatch and Summit.

15 Q Okay.

16 A So, I guess if you--they each had about a hundred
17 acres over and six and Wasatch County--

18 Q Okay.

19 A --so if you deduct that from the 1,600, that would
20 leave 1,400 acres over here, so--

21 Q Well, let's--

22 A I'm sorry about that--

23 Q No, no, no, I'm making it harder because you're--

24 A --I got confused, I just--

25 Q (Inaudible) I was doing the order that (inaudible)

1 How many additional acres in both Summit and Wasatch County do
2 you use in connection with--with grazing the Mayflower
3 property which you either lease or own?

4 A Sixteen hundred acres would be closer, I think.

5 Q Okay. I'm not sure it's necessary, but I thought
6 that was going to be more involved than that.

7 Would you point for the--for the Court where those
8 additional acres are?

9 A They're in the--where--where the 1,600 acres are?

10 Q Just roughly. I think you've got them circled in
11 red.

12 A Well, there's--yeah, there's the Clark Ranch here
13 and then there's property in 2, 3 and 34 and 35 and 26, 26
14 over here.

15 MR. DUNBECK: I'd move--move the admission of what
16 we've identified as Deposition Exhibit 2 and 3 as one exhibit
17 as illustrative of his testimony.

18 THE HEARING OFFICER: It's been marked as Exhibit
19 109.

20 MR. DUNBECK: Thank you.

21 THE HEARING OFFICER: Any objections to Exhibit 109?

22 MR. SMAY: No.

23 THE HEARING OFFICER: Exhibit 109 is received.

24 MR. DUNBECK: Thank you.

25 Oh. You may sit down or stand.

1 If I could just have a minute.

2 Shows why I write notes.

3 Q (By Mr. Dunbeck) I--you pointed out the places
4 where you dropped off the sheep; could you show us--since the--
5 -the new U.S. 40 came in, you testified that the first group,
6 which I think was 50 head of sheep--cattle--let me start over;
7 50 head of cattle essentially just grazed down this direction.
8 And you also indicated that you brought some additional head
9 of cattle in. Those would have grazed then from the South
10 Fork then; is that correct?

11 A Well, we brought them into this area from there.

12 Q Did--did--do you truck them in?

13 A Mostly--

14 Q I--the only reason--

15 A --we have.

16 Q Okay.

17 A Yeah. It's harder to trail cattle, and--but part of
18 them we've driven, but a lot of them we've trucked.

19 Q Where--where do you--

20 A It's harder to trail cattle than it is sheep.

21 Q Okay. Where do you typically drop off the cattle
22 when you bring them in, since the new U.S. 40's been under
23 construction?

24 A The same as the sheep, right here. Why it
25 necessitates that is because you--there's only two physical

1 accesses by the highway into this entire property. You have
2 the--the Mayflower exit here and then you've got this
3 interchange down--the new interchange down there and there is
4 no other place in between where you can get off.

5 Q Have you ever brought the cattle in on what's the
6 old U.S. 40 here and dropped them off down where the reservoir
7 is going to be?

8 A No.

9 Q You bring the--you indicated that you dropped cattle
10 off down by the Mayflower overpass; how many cattle would you
11 put into that area, typically?

12 A Well, the cattle all wound up in that--I mean, there
13 was no--there is--regardless of where the cattle or sheep are
14 dropped off, it doesn't significantly affect where--where they
15 are, most of the time. They--regardless of whether you drop
16 them off up here or down here, they, every year have grazed in
17 relatively--exactly the same manner.

18 Q And where would that be?

19 A Well, it's all--

20 Q Throughout that--

21 A Throughout that area, yes.

22 Q Throughout that--that orange area that you have
23 circled on that?

24 A It's going back to where the water is. Of course,
25 predominantly, the cattle pull into these areas, these

1 canyons. They have to go to water every day and these--like
2 the--like this McKeown Canyon, and then they call it Sagehen
3 Holler and there's--but there's numerous other springs in
4 between, then there's--we have a lot of water up on this
5 property that we, here where the Boston Plant is--

6 Q Uh huh.

7 A All those areas, the cattle have to go into these
8 areas every day to water.

9 Q You're referring to several areas around where the
10 north parcel--

11 A And south parcel, yes.

12 Q --and south parcels are. You indicated that when
13 you were unable to graze the area around Bonanza Flats, that
14 there was an adjustment in the amount of the lease payment; is
15 that correct?

16 A Yes.

17 Q And it was reduced? The amount of the lease payment
18 was reduced?

19 A Yeah. Back in those years, there was a--an
20 adjustment for that.

21 Q Your testimony concerning the grazing activity that
22 you described, both as to numbers, areas grazed and times
23 grazed, have been consistent since at least 1989; isn't that
24 correct?

25 A Yes.

1 Q Within--within a ten percent--

2 A Within--

3 Q --fudge factor where you might have more animals
4 some year?

5 A Absolutely.

6 Q Okay. Could you look again at Exhibit 10--109 and
7 point to the area in which you had the alfalfa problem that
8 you referred to?

9 A Yes. That was right here.

10 Q Okay.

11 A It was on the Mayflower exit and they--there was
12 quite a large area that--that the contractor had to reclaim
13 around the interchange, to reclaim the soil and after they did
14 that, it was--they--somebody mistakenly planted alfalfa with
15 the grass seed. That's what created the problems.

16 Q Okay. Thank you. I think your testimony was that
17 on the west side across--on the west side across the Mayflower
18 interchange, if you will, that the animals primarily stayed
19 within that little bowl--or not--I shouldn't say little, but
20 in--within that bowl that's right on the west side of the
21 road; is that correct? Right around the mine area?

22 A Up--by the confines where I've outlined it on the
23 map, yes.

24 Q Okay. You'll get some that will graze up, or
25 higher, but you have to bring those back down into that area;

1 is that correct?

2 A Yes.

3 MR. DUNBECK: I have no further questions.

4 THE HEARING OFFICER: Redirect?

5 REDIRECT EXAMINATION

6 BY MR. SMAY:

7 Q Mr. Gillmore, let me have you look at Exhibit 104.
8 Exhibit 104, you may remember, was a series of checks. And
9 let me show you, this is the last page of that exhibit and I
10 think there's one there in the middle of the page; do you see
11 that one?

12 A Yes.

13 Q Your testimony, as I recall, was that after you had
14 the difficulty with the dogs and the vacationers and such up
15 in the Bonanza Flat areas, you discontinued your sheep camp in
16 that area, and thereafter, the rent was reduced?

17 A Yes.

18 Q Your check showing the last year you paid the full
19 rent of \$3,000 is your 1989 check; is it not?

20 A Yes.

21 Q And that would have been then the last year in which
22 you had the sheep camp up in that area toward Bonanza Flat?

23 A Yes.

24 Q Have you made any effort to, Mr. Gillmore, to obtain
25 any aid from either the Park City people or the Summit County

1 people in the control of the dogs that prey on the sheep?

2 A We do every year, yes.

3 Q And have they given you what help they can?

4 A Yes. They have.

5 Q And so far, that has not, apparently, cured the
6 problem with respect to Bonanza Flat, I take it?

7 A Not with that. It's--they've helped us tremendously
8 on the other parts of this, but there's--that problem up there
9 is--it's beyond their control right now.

10 Q Referring again--let me--let me take a look at the
11 number that's on this document. I think you said there were
12 approximately 1,600 acres of additional Gillmore family lands,
13 which were used in conjunction with the Mayflower property and
14 the Gillmore Livestock operation.

15 A Yes.

16 Q Are any of those 1,600 acres used for growing
17 plants?

18 A Crops, if--

19 Q Right. Crops.

20 A Yes.

21 Q About how much is used in growing crops?

22 A About 40 acres.

23 Q And how much--and what do you do with the crops?

24 A We grow hay.

25 . Q And what becomes of the hay ultimately?